SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963

No. 26

NATIONAL LABOR RELATIONS BOARD, PETITIONER,

vs.

EXCHANGE PARTS COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

INDEX

	Original	Print
Proceedings in the United States Court of Appeals for the Fifth Circuit		1
Caption	A	1
Petition for enforcement of an order of the National Labor Relations Board	1	1
Order to file petition	3	3
Answer of Exchange Parts Company to petition for enforcement	4	4
Certified list of the National Labor Relations Board	7	5
Proceedings before the National Labor Relations Board	9	7
Charge against employer	9	7
Complaint and notice of hearing	15	11
Answer of respondent	20	14
Order consolidating cases, notice of hearing on objections and order rescheduling hearing	23	15

	Original	Print
Order directing hearing	25	16
Order rescheduling hearing	29	19
Intermediate report	30	20
Appendix A—Notice to all employees	49	34
Motion of union	51	35
Respondent's statement of exceptions and objections	52	36
Order granting motion, severing cases and permitting withdrawal of petition	74	51
Decision and order	75	52
Appendix—Notice to all employees	79	54
Transcript of hearing	81	55
Appearances	81	56
Motions to amend complaint and answers, and granting thereof	83	56
Testimony of C. V. McDonald—direct	86	58
Offer in evidence	98	64
Testimony of M. D. Townley—direct	99	64
—cross	103	65
Stipulation of counsel as to exhibit	110	67
Testimony of C. V. McDonald (recalled)—direct	111	67
Offers in evidence	115	69
Testimony of C. V. McDonald—cross	150	86
General Counsel's Exhibit 2—Letter dated March 4, 1960 from C. V. McDonald and R. S. Bishop of Exchange Parts Company to employees	158	90
Attachments—"Facts You Should Know About Your Benefits at EPCO" and a pink leaflet	159	91
Respondent's Exhibits:	164	99
1—Bulletin pertaining to July 4th holiday	164	99
2—Letter dated November 9, 1959 from Boilermakers International Union to Exchange Parts Company	165	99
3—Letter dated November 4, 1959 from C. V. McDonald to Mr. and Mrs. Employee	167	101
4—"An Important Invitation to Each Employee" dated November 4, 1959 from C. V. McDonald	169	103
5—Invitation dated February 23, 1960 from C. V. McDonald to employees	170	105

	Original	Print
6—Bulletin dated February 16, 1960 from Boilermakers International Union to employees of Exchange Parts Company ..	171	106
7—Bulletin dated February 25, 1960 from Boilermakers International Union to employees of Exchange Parts Company ..	172	108
8—Bulletin dated January 5, 1960 from C. V. McDonald to employees	173	111
9—Time Card of Winfred Hall, February 11-13, 1960	174	113
10—Time card of Winfred Hall, February 22-24, 1960	175	113
11—Vacation check dated February 13, 1960, made payable to Winfred E. Hall	176	114
Minute entry of argument and submission	177	115
Opinion, Wisdom, J.	178	115
Decree	197	130
Clerk's certificate (omitted in printing)	198	130
Order extending time to file petition for writ of certiorari	199	131
Order allowing certiorari	200	131

A IN THE UNITED STATES OF AMERICA
UNITED STATES COURT OF APPEALS
FIFTH JUDICIAL CIRCUIT

NATIONAL LABOR RELATIONS BOARD, *Petitioner*,

versus

EXCHANGE PARTS COMPANY, *Respondent*.

PLEAS AND PROCEEDINGS had and done at a regular term of the United States Court of Appeals for the Fifth Circuit, begun on the first Monday in October, A.D., 1961, before the Honorable Richard T. Rives, the Honorable John R. Brown, and the Honorable John Minor Wisdom, Circuit Judges:

BE IT REMEMBERED, That heretofore, to-wit, on the 21st day of August, A.D., 1961, a Certified List of Documents before the National Labor Relations Board was filed in lieu of the record, in the office of the Clerk of the United States Court of Appeals for the Fifth Circuit; pursuant to a petition for enforcement of an order of the National Labor Relations Board, said petition having been filed and docketed in said Court of Appeals on the 17th day of July, A.D., 1961, as No. 19106, as follows, to-wit:—

1 IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 19,106

NATIONAL LABOR RELATIONS BOARD, *Petitioner*,

v.

EXCHANGE PARTS COMPANY, *Respondent*.

Petition for Enforcement of an Order of the National Labor Relations Board—Filed July 17, 1961

To the Honorable, the Judges of the United States Court of Appeals for the Fifth Circuit:

The National Labor Relations Board, pursuant to the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C., Secs. 151, et seq., as amended by 73 Stat. 519),

hereinafter called the Act, respectfully petitions this Court for the enforcement of its Order against Respondent, Exchange Parts Company, Fort Worth, Texas, its officers, agents, successors and assigns. The proceeding resulting in said Order is known upon the records of the Board as Case No. 16-CA-1357 and 16-RC-2637.

In support of this petition the Board respectfully shows:

(1) Respondent is engaged in business in the State of Texas, within this judicial circuit where the unfair
2 labor practices occurred. This Court therefore has jurisdiction of this petition by virtue of Section 10 (e) of the National Labor Relations Act, as amended.

(2) Upon due proceedings had before the Board in said matter, the Board on May 26, 1961, duly stated its findings of fact and conclusions of law, and issued an Order directed to the Respondent, its officers, agents, successors and assigns. On the same date, the Board's Decision and Order was served upon Respondent by sending a copy thereof postpaid bearing Government frank, by registered mail, to Respondent's counsel.

(3) Pursuant to Section 10(e) of the National Labor Relations Act, as amended, and pursuant to Rule 38(1) of this Court, the Board is certifying and filing with this Court a certified list of all documents, transcripts of testimony, exhibits and other material comprising the entire record of the proceeding before the Board upon which the said Order was entered, which transcript includes the pleadings, testimony and evidence, findings of fact, conclusions of law, and the Order of the Board sought to be enforced.

WHEREFORE, the Board prays this Honorable Court that it cause notice of the filing of this petition and transcript to be served upon Respondent and that this Court take jurisdiction of the proceedings and of the questions determined therein and make and enter upon the pleadings, testimony, and evidence, and the proceedings set forth in the transcript and upon the Order made thereupon a decree

enforcing in whole said Order of the Board, and re-
3 requiring Respondent, its officers, agents, successors, and assigns, to comply therewith.

MARCEL MALLET-PREVOST
Assistant General Counsel
National Labor Relations Board

Dated at Washington, D. C.
this JUL 13 1961 day of

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 19,106

NATIONAL LABOR RELATIONS BOARD, *Petitioner*,
v.
EXCHANGE PARTS COMPANY, *Respondent*.

Order to File Petition

A Petition for Enforcement of an Order of the National Labor Relations Board made May 26, 1961, in the proceeding known upon the record of the Board as Case
4 Nos. 16-CA-1357, 16-RC-2637 having been presented to this Court;

IT IS ORDERED that said Petition be filed and the case docketed as of July 17, 1961,

IT IS FURTHER ORDERED that the National Labor Relations Board file with the Clerk, a certified copy of the transcript of proceedings, or in lieu thereof, a certified list of all the documents, transcripts of testimony, exhibits and other material comprising the record of the proceeding before the National Labor Relations Board, in the above entitled matter, within forty days from this date as required by Rule 38, as amended.

EDWARD W. WADSWORTH
Clerk of the United States Court of Appeals for the Fifth Circuit

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Answer of Exchange Parts Company to Petition for Enforcement

To the Honorable, the Judge of the United States Court of Appeals for the Fifth Circuit.

Exchange Parts Company, respondent, in answer
5 to the petition for enforcement, respectfully states and would show:

1. In respect to the allegations set forth in paragraph numbered (1) of the petition, respondent admits that it is engaged in business in Texas within this judicial circuit and that this Court has jurisdiction of the petition by virtue of the National Labor Relations Act as amended, but otherwise said allegations are denied, particularly in reference to the commission by respondent of unfair labor practices.

2. In respect to the allegations set forth in paragraph numbered (2) of the petition, respondent admits that the Board made findings and conclusions and issued an order, dated May 26, 1961, directed to respondent, a copy of which was served upon respondent but otherwise said allegations are denied all and singular.

3. Respondent is without knowledge covering the allegations set forth in paragraph numbered (3) of the petition.

4. The Board's order and the findings and conclusions upon which it is based are not supported by and are contrary to the law and the substantial evidence on the record considered as a whole and the Order, therefore should be denied enforcement and set aside.

WHEREFORE, respondment prays that, upon review by the Court, the Order of the Board be denied enforcement
6 and set aside and for such other and further relief to which respondent may show itself entitled.

EXCHANGE PARTS COMPANY,
Respondent

(Signed) By KARL H. MUELLER
Karl H. Mueller
Attorney

KARL H. MUELLER
HAROLD E. MUELLER
MUELLER & MUELLER
Attorneys at Law
502 Burk Burnett Bldg.
Fort Worth 2, Texas
Attorneys for Respondent

---

7 IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 19,106

(Title omitted)

Certified List of the National Labor Relations Board

The National Labor Relations Board by its Executive Secretary, duly authorized by Section 102.116, Rules and Regulations of the National Labor Relations Board—Series 8, hereby certifies that the list set forth below constitutes a full and accurate transcript of the entire record of a proceeding had before said Board and known upon its records as Case No. 16-CA-1357 and 16-RC-2637. Such transcript includes the pleadings and testimony and evidence upon which the Order of the Board was entered, and includes also the findings and order of the Board.

VOLUME I—Exhibits introduced in evidence:

GENERAL COUNSEL'S EXHIBITS:
1A - 1J
2

6

8 REGIONAL DIRECTOR'S EXHIBIT NOS.
1-A thru 1-E

RESPONDENT'S EXHIBIT NOS.
1 thru 11

VOLUME II — CERTIFIED RECORD

Stenographic transcript of testimony taking before Trial Examiner Reeves R. Hilton on September 9, 1960 1-134

VOLUME III—Pleadings

1. Trial Examiner Hilton's Intermediate Report dated February 2, 1961 ..... 1- 10
2. Union's[1] motion to withdraw its objections to election held March 18, 1960; to withdraw its Petition in Case No. 16-RC-2637, without prejudice and to sever case No. 16-RC-2637 from Case No. 16-CA-1357 1
3. Respondent's statement of exceptions and objections received March 20, 1961 ..... 1- 16
4. Board's order granting motion, severing cases and permitting withdrawal of petition issued March 23, 1961 1
5. Decision and Order issued by the Board on May 26, 1961 .....

9 IN TESTIMONY WHEREOF, the Executive Secretary of the National Labor Relations Board, being thereunto duly authorized as aforesaid, has hereunto set his hand and affixed the seal of the National Labor Relations Board in the city of Washington, District of Columbia, this AUG 18 1961 day of

/s/ OGDEN W. FIELDS
Ogden W. Fields
Executive Secretary, National Labor Relations Board

(SEAL)

[1] International Brotherhood of Boilermakers, Iron Shipbuilders, Blacksmiths, Forgers and Helpers; AFL-CIO.

BEFORE THE NATIONAL LABOR RELATIONS BOARD

Charge Against Employer—April 26, 1960

Where a charge is filed by a labor organization, or an individual or group acting on its behalf, a complaint based upon such charge will not be issued unless the charging party and any national or international labor organization of which it is an affiliate or constituent unit have complied with section 9 (f), (g), and (h) of the National Labor Relations Act.

INSTRUCTIONS.—File an original and 4 copies of this charge with the NLRB regional director for the region in which the alleged unfair labor practice occurred or is occurring.

10 DO NOT WRITE IN THIS SPACE

Case No.
16-CA-1357

Date Filed
4/26/60

Compliance Status Checked By:

1. Employer Against Whom Charge Is Brought
Name of Employer
Exchange Parts Company

Address of Establishment (Street and number, city, zone, and State)
2500 West Vickery
Fort Worth, Texas

Number of Workers Employed

Type of Establishment (Factory, mine, wholesaler, etc.)
Rebuilding Auto Parts, i.e., Starters, Generators, Carburetors, Brake Shoes, etc.

Identify principal product or service
Auto Parts

The above-named employer has engaged in and is engaging in unfair labor practices within the meaning of section 8 (a), subsections (1) and (3) of the National Labor
(List subsections)

Relations Act, and these unfair labor practices are
11 unfair labor practices affecting commerce within the meaning of the act.

2. Basis of the Charge (Be specific as to facts, names, addresses, plants involved, dates, places, etc.)

On April 25, 1960, it, by its officers, agents and employees, terminated the employment of Sisto Davila, an armature rebuild employee, because of his membership and activities in behalf of International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, AFL-CIO, a labor organization, and at all times since such date it has refused and does now refuse to employ the above named employee.

By the acts set forth in the paragraph above, and by other acts and conduct, it by its officers, agents, and employees, interfered with, restrained and coerced its employees in the exercise of the rights guaranteed in Section 7 of the Act.

3. Full Name of Party Filing Charge (if labor organization, give full name, including local name and number)
International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, AFL-CIO.

4. Address (Street and number, city, zone, and State)
200 Burnett, Room 604
Fort Worth, Texas

Telephone No.
ED 6-7453

12 5. Full name of National or International Labor Organization of Which It Is an Affiliate or Constituent Unit (To be filled in when charge is filed by a labor organization)

6. Address of National or International, if any (Street and number, city, zone, and State)

Telephone No.

7. Declaration

I declare that I have read the above charge and that the statements therein are true to the best of my knowledge and belief.

(Signed) By THERON H. TISON
(Signature of representative or person filing charge)

THERON H. TISON
Special Representative
(Title if any)

April 26, 1960
(Date)

Willfully false statements on this charge can be punished by fine and imprisonment (U. S. Code, Title 18, Section 80)

---

13 April 27, 1960

EXCHANGE PARTS COMPANY
2500 West Vickery
Fort Worth, Texas

Re: Exchange Parts Company
Case No. 16-CA-1357

Board Agent Assigned: Mr. William H. Renkel, Jr.

Gentlemen:

This is to inform you that a charge, a true copy of which is enclosed, was filed in the above-entitled matter.

This case has been assigned to the Board Agent shown above, who will contact you in the investigation of this matter. Please cooperate with him so that all facts of the case may be considered.

This is a statutory priority case which requires immediate investigation.

We are enclosing a form requesting commerce data which we would appreciate your executing and returning to us.

14 You should furnish us *promptly* a full and complete written account of the facts and a statement of

your position in respect to the allegations set forth in the charge.

Sincerely,

(Signed) EDWIN A. ELLIOTT
Edwin A. Elliott
Regional Director

Enclosure

REGISTERED
RETURN RECEIPT REQUESTED

cc: Int'l. Brhd. of Boilermakers, Blacksmiths, AFL-CIO
Attn: Mr. Theron N. Tison, Special Repr.
200 Burnett, Room 604
Fort Worth, Texas

Mr. KARL MUELLER, *Atty.*
Burk Burnett Bldg.
Fort Worth, Texas

Mr. A. J. EBERHARDY
Director of Organization
New Brotherhood Bldg.
Kansas City 11, Kansas

I certify that I served the above referred to charge this day by post paid registered mail on the addressee named above, together with a transmittal letter of which this is a true copy.

(Signed) BEVERLY STRINGER

Subscribed and sworn to before me this 28th day of April, 1960.

(Signed) LURLINE PHILBECK
Designated Agent

(Return receipt omitted)

BEFORE THE NATIONAL LABOR RELATIONS BOARD
SIXTEENTH REGION

Case No. 16-CA-1357

In the Matter of

EXCHANGE PARTS COMPANY
and
INTERNATIONAL BROTHERHOOD OF BOILERMAKERS, IRON SHIPBUILDERS, BLACKSMITHS, FORGERS AND HELPERS, AFL-CIO

Complaint and Notice of Hearing—June 10, 1960

It having been charged by International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, AFL-CIO, 200 Burnett, Room 604, Fort Worth, Texas, under date of April 26, 1960, that
16 Exchange Parts Company, 2500 W. Vickery, Fort Worth, Texas, hereinafter referred to as Respondent, has engaged in and is now engaging in certain unfair labor practices affecting commerce, as set forth and defined in the Labor Management Relations Act, 61 Stat. 136, 73 Stat. 519, hereinafter referred to as the Act, the General Counsel for the National Labor Relations Board (herein called the Board), on behalf of the Board, by the undersigned Regional Director, issues this Complaint and Notice of Hearing pursuant to Section 10(b) of the Act and Section 102.15 of the Board's Rules and Regulations, Series 8, hereby alleges as follows:

1. Copy of the charge hereinabove referred to was served on Respondent by registered mail on April 27, 1960.

2. Respondent is and has been at all times material hereto, a corporation duly organized under and existing by virtue of the laws of the State of Texas, having its principal office and place of business at 2500 W. Vickery in the City of Fort Worth, Texas, and is now and has been at all times herein mentioned continuously engaged at said place of business, hereinatfer referred to as the "plant" in the business of rebuilding parts used on automobiles.

3. Respondent in the course and conduct of its business operations at its plant, during the past twelve-month period,

which period is representative of all times material hereto, purchased parts and equipment consisting principally of automobile parts valued in excess of $50,000, of which more than $50,000 worth was shipped in interstate commerce to the plant from points outside the State of Texas. During the same period, Respondent sold products consisting principally of automobile parts and rebuilt units, valued in excess of $50,000, of which more than $50,000 worth was shipped in interstate commerce from its plant to points outside the State of Texas.

4. Respondent, through its officers, agents, and employees, C. V. McDonald, Vice-President and General Manager, and others, from on or about February 25, 1960 to date, did engage in and continues to engage in the following activity, to wit:

a. On or about February 13, 1960, Respondent did place in effect a change in scheduling vacations, such change permitting employees to obtain an additional weekend during their vacation period.

b. On or about February 25, 1960, announced at an employees' gathering that the Respondent was granting an additional holiday, and did place such policy in effect.

c. On or about March 4, 1960, Respondent did announce and place into effect a change in computing overtime pay during the week a paid holiday is observed, such change resulted in a financial benefit to the employees.

5. By the acts described above in paragraph 4, and by each of said acts, Respondent did interfere with, restrain and coerce and is interfering with, restraining and coercing its employees in the exercise of the rights guaranteed in Section 7 of the Act, and did thereby engage in and is thereby engaging in an unfair labor practice within the meaning of Section 8(a), subsection (1), of the Act.

6. The activities of Respondent, described above in paragraph 4, occurring in connection with the operations of Respondent, described above in paragraphs 2 and 3 have

a close, intimate and substantial relation to trade, traffic and commerce among the several states and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce within the meaning of Section 2, subsections (6) and (7) of the Act.

WHEREFORE, the General Counsel of the National Labor Relations Board has caused this Complaint and following Notice of Hearing to be signed and issued by the Regional Director for the Sixteenth Region, against Exchange Parts Company, Respondent herein.

NOW, THEREFORE, PLEASE TAKE NOTICE that on the 21st day of July, 1960, at 10:00 AM in the forenoon, a hearing will be conducted in Room 2144, 300 W. Vickery, in the city of Fort Worth, Texas, before a duly designated Trial Examiner of the National Labor Relations Board on the allegations set forth in the above Complaint, at which time and place you will have the right to appear in person, or otherwise, and give testimony.

You are further notified that, pursuant to Sections 102.20 and 102.21 of the Board's Rules and Regulations, the Respondent shall file with the undersigned Regional Director, acting in this matter as agent
19 of the National Labor Relations Board, an original and four (4) copies of an answer to said Complaint within ten (10) days from the service thereof and that unless it does so all of the allegations in the Complaint shall be deemed to be admitted to be true and shall be so found by the Board.

Dated at Fort Worth, Texas, this 10th day of June, 1960.

(Signed) EDWIN A. ELLIOTT,
Edwin A. Elliott,
Regional Director
National Labor Relations
Board, Sixteenth Region

20 BEFORE THE NATIONAL LABOR RELATIONS BOARD
SIXTEENTH REGION

Case No. 16-CA-1357

(Title omitted)

Answer of Respondent—June 29, 1960

Exchange Parts Company, Respondent in the above entitled and numbered cause, in answer to the complaint therein, respectfully states:

I.

The allegations set out in Paragraphs numbered 1, 2, and 3 are admitted.

II.

The allegations set out in Paragraphs numbered 4, 5, and 6 are denied.

21 WHEREFORE, Respondent prays that the complaint against it be dismissed.

(Signed) KARL H. MUELLER
Karl H. Mueller
Attorney for Respondent
Exchange Parts Company

MUELLER & MUELLER
502 Burk Burnett Building
Fort Worth 2, Texas

June 29, 1960

---

22 **Certificate of Service**

(Omitted in printing)

BEFORE THE NATIONAL LABOR RELATIONS BOARD
SIXTEENTH REGION

Case No. 16-CA-1357

In the Matter of

EXCHANGE PARTS COMPANY

and

INTERNATIONAL BROTHERHOOD OF BOILERMAKERS, IRON SHIPBUILDERS, BLACKSMITHS, FORGERS AND HELPERS, AFL-CIO

Case No. 16-RC-2637

EXCHANGE PARTS COMPANY, REBUILDERS SERVICE COMPANY, SOUTHWEST SHOE EXCHANGE COMPANY, *Employer*

and

INTERNATIONAL BROTHERHOOD OF BOILERMAKERS, IRON SHIPBUILDERS, BLACKSMITHS, FORGERS AND HELPERS, AFL-CIO, *Petitioner.*

Order Consolidating Cases, Notice of Hearing on Objections and Order Rescheduling Hearing—July 14, 1960

Charge, pursuant to Section 10 of the Labor Management Relations Act, 1947, as amended, and Section 102.9 of the National Labor Relations Board's Rules and Regulations, Series 8, having been duly filed in Case No. 16-CA-1357, and Notice of Hearing and Complaint having issued on the 10th day of June, 1960, and the Board having directed a Hearing on Objections to the election in
24 Case No. 16-RC-2637, authorizing the Regional Director to issue notice thereof, and in order to effectuate the purposes of the Act, and to avoid unnecessary cost or delay,

IT IS HEREBY ORDERED, pursuant to Section 102.33 (b) and 102.64 (b) of the Board's Rules and Regulations, that these cases be, and they hereby are consolidated.

A copy of the Board's Order Directing Hearing on objections is attached hereto.

PLEASE TAKE NOTICE that on the 30th day of August, 1960, at ten o'clock in the forenoon, CST, in Room 2144, at 300

West Vickery, in the City of Fort Worth, Texas, a hearing will be conducted before a duly designated Trial Examiner of the National Labor Relations Board pursuant to the Order of the Board directing a hearing on objections in Case No. 16-RC-2637, at which time and place you will have the right to appear in person, or otherwise, and give testimony.

PLEASE TAKE FURTHER NOTICE that the hearing in 16-CA-1357, originally scheduled for July 21, 1960, is hereby postponed to the date, time and place set out in the preceding paragraph.

IN WITNESS WHEREOF the General Counsel of the National Labor Relations Board, on behalf of the Board, has caused this Order Consolidating Cases, Notice of Hearing on Objections and Order Rescheduling Hearing to be signed by the Regional Director for the Sixteenth Region this 14th day of July, 1960, at Fort Worth, Texas.

(Signed) EDWIN A. ELLIOTT
Edwin A. Elliott,
Director, 16th Region
National Labor Relations Board

(SEAL)

BEFORE THE NATIONAL LABOR RELATIONS BOARD

EXCHANGE PARTS COMPANY, REBUILDERS SERVICE COMPANY, SOUTHWEST SHOE EXCHANGE COMPANY, *Employer*,

and

Case No. 16-RC-2637

INTERNATIONAL BROTHERHOOD OF BOILERMAKERS, IRON SHIPBUILDERS, BLACKSMITHS, FORGERS AND HELPERS, AFL-CIO, *Petitioner*.

Order Directing Hearing—July 11, 1960

Pursuant to a Decision and Direction of Election issued by the Board,[1] an election by secret ballot was conducted on March 18, 1960, under the direction and the supervision

[1] Not reported in the printed volumes of the Board's Decisions and Orders.

of the Regional Director for the Sixteenth Region, among the employees in the appropriate unit. Following the election, the Regional Director served upon the parties
26 a Tally of Ballots which showed that of approximately 234 eligible voters, 228 ballots were cast, of which 94 were for, and 121 were against, the Petitioner, and 13 ballots were challenged. The Petitioner filed timely objections to conduct affecting the results of the election.

In accordance with the Board's Rules and Regulations the Regional Director conducted an investigation, and, on May 6, 1960, issued and served upon the parties his report on Objections to Election, in which he found that certain conduct involved in Objections 1a, 2a, 2b, 2c and 2d (as numbered in his Report) interfered with the conduct of the election and recommended that the election be set aside, and that a new election be ordered. As to the remaining objections, he found that they were without merit and recommended that they be overruled. The Employer filed exceptions to the Regional Director's recommendation that the above objections be sustained and a brief in support of its exceptions.

In the absence of exceptions thereto, the Board adopts *pro forma* the Regional Director's recommendations that the Petitioner's Objections regarding wage increases (1, 1b, 1c and 1d), anticipatory refusal to bargain (2, 2b, 2c, and 2d), parties sponsored by the Employer (1a and 4), and supervisory interviews (3), be, and they hereby are, overruled. As to the Petitioner's Objections regarding fringe benefits (1a) and interviewing of employees away from their work places during working hours (2a, 2b, 2c and 2d), the Board believes that certain material and substantial issues have been raised with respect thereto which can best be resolved by a hearing. Accordingly,

27 IT IS HEREBY ORDERED that a hearing be held before a hearing officer to be designated by the Regional Director to resolve the issues raised by Petitioner's Objections 1a, 2a, 2b, 2c and 2d, as numbered in the Regional Director's Report, including the following issues: (1) The date, the place, and the manner in which the Employer's announcements and granting of additional paid holidays occurred prior to 1960; (2) The reasons why the January,

1960, employee gathering at which the Employer "had planned and intended to announce the sixth holiday" was not held; (3) The dates on which the Employer had announced or placed into effect the vacation and overtime benefits announced in its letter of March 4, 1960; (4) Whether the lunch rooms to which employees were called away from their work places prior to the election for the purposes of urging them to reject the Petitioner were utilized by management for conference with employees, and the nature of such conferences; and

IT IS FURTHER ORDERED that the hearing officer designated for the purpose of conducting the hearing shall prepare and cause to be served upon the parties a report containing resolutions of the credibility of witnesses, findings of fact, and recommendations to the Board as to the disposition of the said issues. Within the time provided for in the Board's Rules and Regulations, any party may file with the Board in Washington, D. C., an original and six copies of exceptions thereto. Immediately upon filing of such exceptions, the party filing the same shall serve a copy thereof upon each of the other parties, and shall file a copy with the Regional Director. If no exceptions are filed thereto, the Board will adopt the recommendations of the hearing officer; and

28 IT IS FURTHER ORDERED that the above-entitled matter be, and it hereby is, referred to the Regional Director for the Sixteenth Region for the purpose of arranging such hearing, and that the said Regional Director be, and he hereby is, authorized to issue early notice thereof.

Dated, Washington, D. C., July 11, 1960.

By direction of the Board:

HOWARD W. KLEEB
Associate Executive Secretary

29 BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION SIXTEEN

Case No. 16-CA-1357—16-RC-2637

In the Matter of

EXCHANGE PARTS COMPANY

and

INTERNATIONAL BROTHERHOOD OF BOILERMAKERS, IRON SHIPBUILDERS, BLACKSMITHS, FORGERS & HELPERS, AFL-CIO

Order Rescheduling Hearing—August 5, 1960

IT IS HEREBY ORDERED that the hearing in the above-entitled matter be and the same hereby is rescheduled from August 30, 1960, to September 9, 1960, at the same time and place.

DATED at Fort Worth, Texas, this 5th day of August, 1960.

(Signed) EDWIN A. ELLIOTT
Edwin A. Elliott,
Regional Director,
National Labor Relations Board

(SEAL)

20

30

IR-533
Fort Worth, Tex.

BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF TRIAL EXAMINERS
WASHINGTON, D. C.

Cases Nos. 16-CA-1357—16-RC-2637

(Titled omitted)

Joseph P. Parker, Esq., for the General Counsel.

Karl H. Mueller, Esq., and *Harold E. Mueller, Esq.*, of Fort Worth, Tex. for the Respondent.

Messrs. J. M. Scott, Representative, of Fort Worth, Tex., and *A. J. Eberhardy*, Representative, of Kansas City, Kan., for the Union.

Before: *Reeves R. Hilton*, Trial Examiner.

Intermediate Report—February 2, 1961

STATEMENT OF THE CASE

The complaint duly issued on June 10, 1960, based upon charges filed by the above-named Union, alleges that
31 the Respondent or Company, by granting certain benefits to its employees has engaged in unfair labor practices in violation of Section 8 (a) (1) of the Act. The answer denies the commission of any unfair labor practices.

In the representative case, the Board entered its order dated July 11, 1960, directing the Regional Director to hold a hearing on specified issues raised by Petitioner's Objections to the conduct of an election, which was held pursuant to a Decision and Direction of Election issued by the Board.

On July 14, 1960, the Regional Director issued an order consolidating the representation and complaint cases and directing that a hearing be held on the issues raised therein at a time and place stated in the notice of hearing.

Pursuant to the above order and notice a hearing was held before the undersigned Trial Examiner on Septem-

ber 9, 1960, at Fort Worth, Texas. All parties were present and represented at the hearing and were afforded opportunity to adduce evidence, to examine and cross-examine witnesses, to present oral argument and to file briefs. The parties waived argument and thereafter the General Counsel and counsel for the Respondent filed briefs, which I have carefully considered.

Upon the entire record and from my observation of the witnesses, I make the following:

32 FINDINGS OF FACT

I. The Company's business

The complaint alleges, and the answer admits, that the Company, a Texas corporation, maintains its principal office and place of business in Fort Worth, Texas, where it is engaged in the business of rebuilding parts used in automobiles. In the 12-month period preceding the issuance of the complaint the Company purchased automobile parts and equipment valued in excess of $50,000 from places outside the State of Texas, and sold and shipped automobile parts and rebuilt units valued in excess of $50,000 to points outside the State of Texas. I find the Company is engaged in commerce within the meaning of Section 2 (6) and (7) of the Act.

II. The labor organization involved

The Union is a labor organization within the meaning of Section 2 (5) of the Act.

III. The unfair labor practices

A. *The issues*

The question raised by the complaint and answer is whether the Company granted certain benefits to its employees in violation of Section 8 (a) (1) of the Act. In the representation case the issue is whether such conduct and a meeting of management with the employees shortly before the election affected the outcome of the election.

33 B. *Chronology of events*

Only two witnesses testified at the hearing, C. V. McDonald, vice president and general manager of the Company, and M. D. Townley, a company employee. There is no serious dispute concerning many of the facts and events.

On November 9, 1959, the Union sent a letter to the Company stating it represented a majority of the employees and requested a meeting for the purpose of discussing contract terms. While McDonald admitted receiving the letter the record does not indicate whether he made any reply thereto.

In any event the Union filed a representation petition on November 16. Thereafter a hearing was held on December 29, and on February 16, 1960, the Board issued its Decision and Direction of Election. The election was held on March 18, and upon losing the election the Union filed Objections to the conduct thereof.

On April 26, 1960, the present charge was filed and the complaint was issued on June 10.

C. *The benefits granted to employees*

1. The additional holiday

The complaint alleges that about February 25, 1960, the Company announced that it was granting an additional holiday to the employees.

34 McDonald testified, and his testimony is not challenged, that in 1955 the Company established its first holiday and announced that a holiday would be added each year until further notice. The Company followed that policy and in 1958 the 4 National holidays were established as paid holidays. In the early part of 1959 McDonald advised the employees that the holiday for that year would be a "floating holiday," that is, it would follow one of the regular holidays.

On November 4 and 5, 1959, the Company held meetings of its employees at the plant at which time McDonald informed them that the floating holiday would be the day after Christmas. He also announced that an additional

floating holiday would be granted in 1960. During December 1959, the Company held its usual Christmas party at the Pioneer Palace, but McDonald made no mention of the additional floating holiday, as he had done in the past. McDonald explained that he was considering the employee's birthday as the additional holiday and a survey to determine how this would affect production had not been completed. Around the first of January 1960, the survey was completed and McDonald planned to have an employee "get-together" at the Pioneer Palace when h ewould offer their birthday as a holiday. However, Pioneer Palace was not available in January, no other suitable place could be found, so the party or meeting was not held until February 25. At this meeting McDonald advised the employees that he would let them decide whether they desired another floating holiday or their birthday for 1960, and a majority of the employees voted in favor of the birthday holiday. This was the first time, since establishment of the holiday policy in 1955, that the employees were permitted to vote on and select the holiday they desired. McDonald admitted he told the employees that the Board in Washington had directed an election be held to determine whether the employees wished to hand over their right to speak and act for themselves. He further stated the union organizer had twisted some of the facts in his bulletins so as to put the Company in a bad light. McDonald pointed out improvements and changes made in the past year when there was no threat of a union and concluded by urging all the employees to vote in the election.

Townley was present at one of the meetings in November 1959, as well as the meeting of February 25, 1960, and testified substantially the same as McDonald concerning the announcement or discussion of holidays at these meetings. He was not questioned concerning McDonald's statements regarding the election and improvements in working conditions.

2. The payment of holiday overtime

The complaint alleges that about March 4, 1960, the Company announced a change in the method of computing overtime which resulted in financial benefits to the employees.

On March 4, 1960, the Company sent a letter to all its employees with a document attached giving a resume of benefits obtained by the employees each year over a number of years. In listing the benefits granted so far in 1960, including the birthday holiday, the document states there would be "No loss of overtime during the week a paid holiday is given. This will mean $5.00 or $6.00 more per employee per holiday." The document, McDonald said, is in error
36 for the overtime pay was granted in 1959; not in 1960. McDonald explained that in 1959 the regular workweek was extended to 49½ hours, 5½ days, and the Company was paying straight time for established holidays instead of considering it as time actually worked. Sometime that year it was brought to his attention the Company was not giving a full holiday in that the employees were receiving less pay in the holiday week than if they had worked. Accordingly, McDonald posted a bulletin at the plant covering the next holiday, Saturday, July 4, which stated that in line with company policy the employees would be paid 4½ hours for the holiday, regular or overtime in accordance with hours worked, but to qualify for holiday pay the employee had to be working the day preceding and the day following the holiday. McDonald further stated due to some misunderstanding by the accounting department employees did not receive holiday pay in accordance with this policy for the remaining holidays in 1959. Shortly after Christmas McDonald learned that the holiday pay policy had not been carried out and he decided to apply the policy to future holidays. The employees were not paid for the 1959 holidays for the reason that some workers left the Company and retroactive payments would cause confusion and necessitate the changing of records.

3. The change in the vacation schedule

The complaint alleges that about February 13, 1960, the Company changed its vacation schedule by permitting employees to obtain an additional weekend.

In the above-mentioned document of March 4, the Company announced that one of the 1960 benefits was
37 "Vacation time extended 1½ days." McDonald admitted the foregoing announcement and gave the

following explanation for changing the vacation schedule. Prior to 1960 the plant was working on a 49½ week and that the weekly payroll period ran from Friday to Thursday, with Friday being payday. At that time vacations commenced on Friday and ended on Thursday. In January 1960, the workweek was changed to end on Wednesday to allow the accounting department the necessary time to pay the employees on Friday. Under this system vacations would start in the middle of the week, so the Company decided to change the vacation period from the payroll period to the calendar week. This resulted in the employees receiving an additional 1½ days, the weekend, which normally was not worktime. On January 5, 1960, the Company posted a bulletin advising the employees of the change in the payroll week but no mention was made of any change in the vacation schedule. McDonald admitted the first "general announcement" concerning the vacation week was made on March 4, although the employees were aware of the change and one employee who took his vacation about February 19, was informed his vacation time would be computed under the new system.

Townley testified he could not definitely recall when he first heard vacation time was being extended but he did not believe it was prior to the announcement of March 4.

Concluding Findings

As previously stated there is no real dispute concerning the facts of the case, which I find as related above. Nor is there any question that substantial benefits were granted to the employees. In essence the General Counsel
38 contends that the granting and timing of the announcements of these benefits during the union campaign and pending an election, irrespective of motive, constitutes a violation of the Act. In brief, the Company contends its conduct was not unlawful because the sixth holiday and holiday overtime were granted before any union activity and the change in the vacation schedule was made and actually put into effect prior to the Decision and Direction of the Board in the representation case.

The record plainly shows that the sixth holiday was announced on February 25, 9 days after the decision in the

representation case and that on March 4, some 2 weeks before the election, the Company sent communications to its employees stressing the benefits it had granted so far in 1960, including the sixth holiday, holiday overtime and extended vacation time. While McDonald offered explanations for the Company's actions they are neither convincing nor persuasive. Thus he related that although he told the employees as early as November 4 and 5, 1959, that a floating holiday would be granted in 1960, he did not, as customary, announce the holiday at the annual Christmas party that year. This failure, McDonald attributed to the fact that a study was being made as to whether the employee's birthday should be observed as a holiday. Despite the completion of the study around the first of January 1960, McDonald decided to delay announcement of the holiday until a party could be arranged later that month. However, due to the inability to obtain a suitable place the party was not held until February 25, when announcement was made and for the first time, the employees were permitted to vote on a choice of holidays. Frankly, I see no reason why McDonald could not have followed custom and announced the holiday at the Christmas party, or at least informed the employees the birthday holiday was then under consideration. In any event, although the birthday survey was completed around the first of January, nevertheless no declartion was made until the party of February 25. Had the Company been interested in merely notifying the employees that a sixth holiday had been granted, be it a floating one or their birthday, it could have posted a bulletin to that effect or sent letters to the employees as it had in the past and did thereafter. Instead, the Company elected to wait until after the issuance of the Board's Decision and Direction of Election which demonstrates to me that the action was designed to interfere with, restrain, and coerce the employees in the exercise of their rights guaranteed under the Act and to influence the outcome of the election rather than any inability to find a suitable place for the party.

Equally without merit is McDonald's explanation of the payment of holiday overtime. First, I fail to see how the bulletin declaring the payment of 4½ hours at regular or overtime rates for July 4, 1959, can be construed as a state-

ment of policy that all holidays would be paid on that basis. Concededly, the employees were not given holiday pay for the remaining four holidays in 1959. McDonald attributed this to an error in the accounting department and asserted that while he first learned of this error around Christmas no retroactive payments were made and he waited until his letter of March 4, 1960, to announce this benefit to the employees. Manifestly, this change became effective July 4, 1960, or the birthday of the employee. I find it difficult to believe that had the Company established such a policy the accounting department would have failed to carry it out or that there would have been no complaints from the employees, some 285 in number, regarding their failure to receive holiday overtime until Christmas of 1959.

The remaining benefit pertains to the extension of the vacation schedule. While it is true the new vacation schedule gave only an extra weekend, normally unpaid time, this was a change in conditions of employment and a benefit to the employees. Admittedly, the initial general announcement of this benefit was made in the Company's communications to the employees of March 4. McDonald sought to explain this away by stating a bulletin changing the payroll week had been posted on January 5, 1960, and in February one employee had been advised he could take his vacation under this policy. There is nothing in the January 5 bulletin indicating vacation time had been extended and I do not consider as significant the fact that at or about the time of the issuance of the Board's Decision and Direction of Election that one employee was permitted an additional weekend of his vacation.

As I view the evidence, McDonald's excuses are nothing more than pretexts to justify the Company's actions in announcing the granting of the foregoing benefits in order to interfere with, restrain, and coerce the employees in the exercise of their rights guaranteed under the Act and to influence the results of the election.

McDonald's explanations, weighed in the most favorable light, amount to nothing more than an attempt to prove that in announcing and granting economic benefits to the employees during the course of the Union's organizing campaign, which McDonald characterized as "intensive" the

Company was not motivated by any unlawful con-
41 siderations. However, motive is neither controlling nor material. In *American Freightways, Inc.*, (124 NLRB 146), the Board rejected the Respondent's contention that economic benefits granted to employees during an organizing campaign were not prompted by illegal motives and stated:

> It is well settled that the test of interference, restraint, and coercion under Section 8 (a) (1) of the Act does not turn on the employer's motive or on whether the coercion succeeded or failed. The test is whether the employer engaged in conduct which, it may reasonably be said, tends to interfere with the free exercise of employee rights under the Act. Applying this test, we find that by announcing its change in overtime policy during the course of the organization campaign among office employees, the Respondent violated Section 8 (a) (1) of the Act.

I conclude and find that by announcing and granting economic benefits to the employees under the circumstances found herein the Company thereby interfered with, restrained, and coerced its employees in the exercise of their rights guaranteed in Section 7 of the Act in violation of Section 8 (a) (1) thereof.

Having found that the Company engaged in conduct in violation of Section 8 (a) (1), I further find that it thereby interfered with the election conducted on March 18, 1960. (*Syracuse Color Press, Inc.*, 103 NLRB 377, 381; Enforced 209 F. 2d 596 (C. A. 2)).

42 D. *The representation case*

The Board's Order of July 11, 1960, directs that a hearing be held on the issues raised by Petitioner's Objections 1a, 2a, 2b, 2c, and 2d as numbered in the Regional Director's Report, including the circumstances under which the economic benefits were announced and granted.

I have already found that the Company by announcing and granting economic benefits and by changing conditions of employment thereby engaged in conduct in violation of Section 8 (a) (1) of the Act, so I recommend that Objection 1a, which covers such benefits be sustained.

At the hearing Petitioner's representative stated he would not litigate Objection 2a, which relates to a meeting held of the female employees and 2d, which refers to separate meetings held with certain groups of employees. I recommend these Objections be overruled.

The remaining Objections, 2b and 2c, are based on separate meetings which McDonald held with employees in the brake shoe department and the carburator department shortly before the election.

McDonald, as a witness for the Petitioner, testified that on March 16, 1960, the employees in the carburator department were called to his office where he spoke to them about low production. He stated many similar meetings had been called in the preceding year for the purpose of obtaining suggestions regarding production problems. McDonald said the only time the Union was mentioned was in connection with excessive talking and he warned the men there
43 would be no talking for or against the Union while they were working at their benches.

I find McDonald's testimony, which is the only testimony on this point, is insufficient to support Objection 2c, so I recommend that the same be overruled.

McDonald admitted he held a meeting with the brake shoe department employees, totaling about 12 men, in his office the morning of March 17, 1960. The meeting was called because complaints had been received from some of the employees that they had been threatened with loss of their jobs if they did not support the Union and vote for it in the coming election. McDonald warned the employees that there would be no threats either by employees in favor of the Union or by those opposed to organization. There was no other reference to the Union, except when one of the employees asked if seniority would prevail in the event of unionization of the shop. McDonald answered he did not believe in seniority because it eliminated employee incentive and that as a young man he had quit a railroad job because of its seniority policy.

McDonald denied he interrogated any employees regarding the Union or that he touched upon the subjects of a strike or an agreement with the Union.

Townley was present at the meeting of March 17 and stated that at the opening thereof McDonald commented that some of the men were wearing union buttons. McDonald then asked Townley, who was wearing a union button, "What do you think that a union could give you that I don't give you?" Townley started to explain
44 he could obtain seniority and job rights but McDonald cut him off and addressed the same question to employee Pollard. He admitted McDonald made some reference to his experience with a union while working for a railroad but he was hazy as to just what McDonald stated. Townley further stated that McDonald went on to say he would not bargain with the Union, that a strike was the only "weapon" available to the Union and if the employees went on strike he would replace them. Townley admitted McDonald spoke about threats being made to employees as to what would happen to them when the Union came into the shop, but, again, he could not recall the substance of his remarks. When asked if McDonald made any mention of the election Townley replied, "Well, in a roundabout way the whole deal was union, more or less. I mean the way I could see, that was the main reason we was in there to start with."

McDonald, as witness for the Company, denied that he said he would not bargain with the Union or that he stated a strike was the Union's only "weapon" and that he would replace the employees if they went on strike.

The significant phase of this meeting, as I view it, is Townley's claim McDonald said he would not bargain with the Union and his reference to a strike and replacement of employees if they struck the plant. McDonald flatly denied uttering any such remarks. Neither the Petitioner nor the Company offered any corroborative testimony on this disputed point. Thus, a clear question of credibility is presented. From my observation of Townley and McDonald while testifying in this matter I accept McDonald's testimony and find he did not make the statments attributed to him by Townley. I find the remaining evidence as to
45 the occurrences at this meeting insufficient to support Objection 2b, so I recommend the Objection be overruled.

IV. The effect of the unfair labor practices upon commerce

The activities of the Respondent, set forth above, occurring in connection with the operations of the Respondent have a close, intimate, and substantial relation to trade, traffic, and commerce among the several States, and tend to lead to labor disputes burdening and obstructing commerce and the free flow thereof.

V. The remedy

Having found that the Respondent has engaged in certain unfair labor practices, I will recommend that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

I recommend that the Respondent cease and desist from interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed under Section 7 of the Act by granting economic benefits and by changing the terms and conditions of employment. However, nothing herein shall be construed as requiring the Respondent to vary or abandon any economic benefit or any term or condition of employment which it has heretofore established.

Having found that the unlawful activities of the Respondent took place at a time when employees were being asked to indicate their free choice of a bargaining representative in an election directed by the Board the Respondent
46 thereby interfered with this free choice. I therefore recommend that the results of the election held on March 18, 1960, be vacated and set aside and that a new election be held at a suitable time after the effects of the unfair labor practices have been dissipated.

Upon the basis of the above findings of fact, and upon the entire record in the case, I make the following:

Conclusions of Law

1. Exchange Parts Company is engaged in commerce within the meaning of Section 2 (6) and (7) of the Act.

2. International Brotherhood of Boilermakers, Iron Shipbuilders, Blacksmiths, Forgers and Helpers, AFL-CIO,

is a labor organization within the meaning of Section 2 (5) of the Act.

3. By granting certain economic benefits to its employees and by changing certain terms and conditions of employment, including an additional paid holiday, holiday overtime, and change in the vacation schedule, at a time when the Union was seeking to organize the employees and during the pendency of representation proceedings before the Board, the Respondent has interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed in Section 7 of the Act, in violation of Section 8 (a) (1) of the Act.

4. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2 (6) and (7) of the Act.

47 5. Because of the Respondent's interference with and coercion of the voters in the election of March 18, 1960, thereby depriving voters of a free choice in the election, the election should be set aside.

Recommendations

Upon the basis of the foregoing findings of fact and conclusions of law, and upon the entire record in the case, I recommend that Exchange Parts Company, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Interfering with, restraining, or coercing its employees in the exercise of rights guaranteed in Section 7 of the Act by granting them economic benefits; or by changing the terms and conditions of their employment; provided, however, that nothing in this recommended order shall be construed as requiring the Respondent to vary or abandon any economic benefit or any term or condition of employment which it has heretofore established;

(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of the right to self-organization, to form labor organizations, to join or assist International Brotherhood of Boilermakers, Iron Shipbuilders, Blacksmiths, Forgers and Helpers, AFL-

CIO, or any other labor organization, to bargain collectively through representatives of their own choosing and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection or to refrain from any or all such activities.

48 2. Take the following affirmative action which I find will effectuate the policies of the Act:

(a) Post at its plant in Fort Worth, Texas, copies of the notice attached hereto marked Appendix A. Copies of said notice, to be furnished by the Regional Director for the Sixteenth Region, shall, after being signed by the Respondent's authorized representative, be posted by the Respondent immediately upon receipt thereof, and maintained by it for sixty (60) consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material;

(b) Notify the Regional Director for the Sixteenth Region, in writing, within twenty (20) days from the date of the receipt of this Intermediate Report, what steps the Respondent has taken to comply therewith.

I further recommend that, unless within twenty (20) days from the date of receipt of this Intermediate Report the Respondent notifies said Regional Director in writing that it will comply with the foregoing recommendations, that the National Labor Relations Board shall issue an order requiring the Respondent to take the action aforesaid.

I further recommend that the election of March 18, 1960, be set aside and that the Board order a new election be held at a suitable time after the effects of the unfair labor practices have been dissipated.

49 Dated at Washington, D. C. February 2, 1961.

(Signed) REEVES R. HILTON
Reeves R. Hilton
Trial Examiner

APPENDIX A

NOTICE TO ALL EMPLOYEES PURSUANT TO THE RECOMMENDATIONS OF A TRIAL EXAMINER of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, we hereby notify our employees that:

WE WILL NOT interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed in Section 7 of the Act by granting them economic benefits; or by changing the terms or conditions of their employment: *Provided*, however, that nothing in this recommended order requires us to vary or abandon any economic benefit or any term or condition of employment which has heretofore been established.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the right to self organization, to form labor organizations, to join or assist INTERNATIONAL BROTHERHOOD OF BOILERMAKERS, IRON SHIPBUILDERS, BLACKSMITHS, FORGERS AND HELPERS, AFL-CIO, or any other labor organization, to bargain collectively through representatives of their own choosing and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection.

All our employees are free to become, to remain, or to refrain from becoming or remaining, members of any labor organization of their own choosing.

EXCHANGE PARTS COMPANY
(Employer)

Dated ——— ——————— By ———————
(Representative) (Title)

This notice must remain posted for 60 days from the date of posting and must not be altered, defaced, or covered by any other material.

51 BEFORE THE NATIONAL LABOR RELATIONS BOARD

Case No. 16-RC-2637

(Title omitted)

Motion of Union—March 2, 1961

Comes now International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, AFL-CIO, and files this its Motion as follows:

1. To withdraw its Objections to election held March 18, 1960.
2. To withdraw its Petition in Case Number 16-RC-2637, without prejudice, and
3. To sever case number 16-RC-2637 from the unfair labor practice case (Case Number 16-CA-1357)—presently before the Board.

The petitioner takes this action since it will have been one year since the election in 16-RC-2637 was conducted and the objections raised by petitioner have now become moot. Petitioner may now file a new petition for
52 certification in order to resolve the question concerning representation without further delay.

(Signed) BUDDIE FALLS
International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, AFL-CIO

By: Buddie Falls
Business Manager & Financial Sec.

DATE: March 2, 1961.

BEFORE THE NATIONAL LABOR RELATIONS BOARD

Respondent's Statement of Exceptions and Objections

Exchange Parts Company, respondent, respectfully submits the following statement of its exceptions and objections to the Intermediate Report of the Trial Examiner:

I.

The Intermediate Report is not in substantial compliance with the Board's rules and regulations in that it does not contain "findings of fact, conclusions, and the reasons or basis therefor, upon all material issues of fact, law, or discretion presented on the record" but instead, is fragmentary, incomplete, inaccurate, misleading and argumentative.

53

II.

The Examiner erred in not finding that the following are the only unfair labor practices alleged in the complaint and in not confining the hearing and his report to the issues tendered thereby;

"a. On or about February 13, 1960, respondent did place in effect a change in scheduling vacations, such change permitting employees to obtain an additional weekend during their vacation period.

b. On or about February 25, 1960, announced at an employees' gathering that the respondent was granting an additional holiday, and did place such policy in effect.

c. On or about March 4, 1960, respondent did announce and place into effect a change in computing overtime pay during the week a paid holiday is observed, such change resulted in a financial benefit to the employees." (G. C. Ex. 1 (c))

III.

The Trial Examiner erred in each of the following particulars:

(1) in not recognizing, finding and giving effect to the indisputable fact that the complaint contained no allegation in respect to the pendency of a representation proceeding

and tendered no issue in substance or effect that the occurrences therein alleged constituted unfair labor practices
54 because of the prior filing of a representation petition or the pendency of a proceeding thereon or the issuance of a decision and direction of election therein: (G. C. Ex. 1 (c))

(2) in not recognizing, finding and giving effect to the indisputable fact that notwithstanding the Regional Director's order of consolidation to which respondent-employer objected the hearing, testimony and evidence in case 16-CA-1357 were completed and all parties rested prior to the beginning of the hearing on objections in case 16-RC-2637 and the records in the two proceedings are separate and distinct and were expressly so undertaken and accomplished by the Examiner and the parties: (R. 7-13)

(3) in receiving and admitting testimony and evidence in case 16-CA-1357 over respondent's objection concerning matters involved or relating to case 16-RC-2637; (R. 15-17)

(4) in making findings and conclusions in case 16-CA-1357 relative to the filing of the petition, the pendency of proceedings thereon and the issuance of an order and direction of election in case 16-RC-2637, the complaint having tendered no issue in respect thereto and there being no issue properly before the Examiner concerning same.

IV.

In the alternative and only in the event it is finally determined and held that the pendency of case 16-RC-2637 and the issuance of the decision and direction of election therein are relevant and material to the issues raised and tendered by the complaint and properly are to be considered in passing thereon, the Examiner erred in not
55 making and giving effect to each of the following findings and conclusions, each of which is supported by the record and by undisputed evidence and testimony, and, by the law, where the conclusion is one of law or of mixed law and fact;

(1) There is nothing in the record upon which to base a finding or a conclusion or from which to draw a reason-

able inference that there was a union or organizational activity on the part of or among respondent's employees, or any of them, or by a union on or prior to November 5, 1959, or that respondent had any knowledge or information in respect to any such activity prior to receipt by it of the charging union's letter dated November 9, 1959.

(2) C. V. McDonald testified positively, and his testimony is uncontroverted and unimpeached, that respondent had no knowledge or information concerning union or organizational activity prior to receipt of the union's letter dated November 9, 1959, and there is nothing in the record to the contrary. (R. 52, 91, Resp. Ex. 2)

(3) In 1955, respondent established Christmas as a paid holiday and announced to its employees that it would add another paid holiday each year thereafter until further notice and, in accordance therewith, in 1956, Thanksgiving was made a paid holiday; in 1957, Labor Day; and in 1958, July Fourth. Early in 1959, it was announced that the holiday for that year would be a "floating" day to be added to one of the holidays already established. The sixth holiday—the one added for 1960—was announced to the employees on November 4 and 5, 1959, at which time the day to be observed as such had not been determined. (R. 35-38, 50-51, 59-60, 89-91)

56 (4) The plan and policy of respondent to add a paid holiday each year following 1955 until further notice was established by the positive, sworn, uncontroverted and unimpeached testimony of C. V. McDonald, and there is nothing in the record to the contrary. (R. 50-51, 91)

(5) In a letter to employees, dated November 4, 1959, relative to the meetings on November 4 and 5, 1959, respondent pointed out, among other employee benefits, "more paid holidays each year". (Resp. Ex. 3, R. 53-57)

(6) Respondent notified its employees at meetings on November 4 and 5, 1959, that it had added another paid holiday for the year 1960. M. D. Townley and C. V. McDonald, the only two witnesses in the case, so testified positively under oath on the exact point and there is nothing in the record to the contrary. (R. 35, 60, 90-01)

(7) The charging union's request for recognition was made in its letter dated November 9, 1959, its petition for certification was filed November 16, 1959, the hearing thereon was held December 29, 1959, the date for filing briefs with the Board in respect thereto was January 26, 1960, the Board's decision and direction of election was dated, issued and mailed in Washington, D. C., on Friday, February 19, 1960, the following Monday being Washington's birthday on which there were no mail deliveries. Respondent had no knowledge or information concerning the issuance of that decision and direction until it received a copy thereof through the mail. (R. 15, 83-84)

(8) The advent of the union and its request for recognition and the filing of its petition for certification,
57 all subsequent to November 5, 1959, did not give rise to an obligation on the part of respondent to abandon or suspend its established plan and policy to add a paid holiday each year or to cancel, rescind or withhold the holiday for 1960 that it announced November 4 and 5, 1959, and its failure to abandon or suspend such plan or policy or to cancel, rescind or withhold the sixth holiday did not constitute a violation of the Act.

(9) At the time of the employee meetings on November 4 and 5, 1959, respondent was considering making the sixth holiday the employee's birthday and, in line therewith, made a survey having in mind taking up the matter at the January employees meeting if the results of the survey were favorable. The meeting of February 25, 1960, at which the matter was presented, was arranged and announced February 13, 1960, prior to the issuance of the Board's decision and direction of election in Washington on February 19, 1960. Respondent was not required to cancel such meeting or to refrain from arranging the date or occasion to be observed as the sixth holiday which had been added and announced November 4 and 5, 1959, and its failure to do so did not constitute a violation of the law. (R. 51, 62-73, 91, Resp. Exs. 5, 6 and 7)

(10) It was not usual or customary for respondent to announce the addition of holidays at the employees' Christmas party each year, the "floating" holiday added in 1959

having been announced in January, 1959, and not designated to be taken with the Christmas holiday that year until November 4 and 5, 1959. The failure of respondent to *again* announce the addition of the sixth paid holiday which had been announced November 4 and 5, 1959, or to
58 designate the day to be taken as such at the employees Christmas party in 1959, does not give rise to or support any inference or finding of illegal motivation or unlawful conduct on the part of respondent in respect to the addition of the sixth paid holidays or otherwise.

(11) It was not unusual or customary for respondent to announce, by bulletin or letter to employees, the addition of a paid holiday each year or to thereby designate the day or occasion to be observed as a paid holiday and the failure of respondent to issue a letter or bulletin to employees in December, 1959 or January, 1960, announcing the addition of the sixth holiday in 1960, which had been announced previously at the employees meetings November 4 and 5, 1959, or to then or in that manner announce that the Company was considering making the sixth holiday the employee's birthday does not give rise to or support an inference or finding that respondent was illegally motivated or acting in contravention of the law in respect to the addition of such holiday or otherwise.

(12) Offering the employees their birthday as their sixth paid instead of a "floating" holiday to be taken with some other established holiday and permitting them to express their preference and in fixing the sixth paid holiday as the employee's birthday, all at the employees' party on February 25, 1960, did not contravene the law, the sixth holiday having been added in accordance with a plan established in 1955 and followed consistently since then and the addition of the sixth holiday having been announced November 4 and 5, 1959, prior to the advent of the union and organizational activity and prior to the initiation of the representation proceeding.

59 (13) C. V. McDonald denied positively under oath without contradiction or impeachment that respondent granted the sixth paid holiday for the purpose of interfering with, coercing or restraining employees in the

exercise of their rights under the Act and there is no substantial evidence to support a contrary finding or conclusion.

(14) Respondent would have been guilty of a violation of the Act had it taken away from employees the sixth paid holiday established in accordance with its long-established plan and policy and made certain to them at the employees' meetings November 4 and 5, 1959, because of the advent of union activity or the pendency of the representation proceeding.

(15) The addition and announcement of the sixth paid holiday by respondent did not constitute a violation of the Act.

(16) Prior to July 4, 1959, respondent established the policy of treating paid holidays not worked as time worked for purposes of computing overtime pay for the work week in which such holiday occurred. Prior to and at the time of the establishment of such policy, respondent's employees' regular work week was 49½ hours. Failure to treat a paid holiday as time worked for purposes of overtime computation for the week resulted in the employees receiving less pay for the week than they would have received had they worked the day observed as a holiday. The result actually amounted to the employees receiving a half holiday in terms of pay. This was not the intention or purpose of respondent. Mr. McDonald so testified and there is nothing to the contrary in the record. Consequently, when it came to the attention of Mr. McDonald in 1959, prior to July 4, he established the policy of treating paid holidays not worked as time worked for overtime purposes. This policy was evidenced in respondent's notice to employees covering the July 4th holiday in 1959. (Resp. Ex. 1, R. 23, 40, 73-74, 76, 84-85)

(17) In 1959, following the Christmas holidays, it came to the attention of Mr. McDonald, that through oversight or error in the accounting department, the policy in respect to treating paid holidays as time worked for overtime purposes had not been carried out subsequent to July 4, 1959. Mr. McDonald sought and obtained the advice of counsel

as to what respondent should do in the circumstances. Counsel advised respondent that the pendency of the representation proceeding did not require respondent to perpetuate the error of the accounting department and that respondent should give effect to its previously established policy so that the pendency of such proceeding would not deprive the employees of benefits granted to them prior to the commencement of such proceeding. Respondent acted on such advice and listed this in its communication of March 4, 1960 as one of the benefits enjoyed by employees, although it was erroneously shown as having been granted in 1960. (R. 22-24, 27, 84-87)

(18) The failure of respondent to make retroactive adjustments in respect to its established overtime-holiday policy does not give rise to or support the inference or finding that such policy had not been established or that the respondent was illegally motivated or guilty of unlawful conduct in thereafter adhering and giving effect to
61 such policy or in listing such policy in its March 4 communication as a benefit enjoyed by employees.

(19) Respondent was not required by the advent of union organization, the pendency of the representation proceeding, or the issuance of the Board's decision and direction of election therein, to cancel, rescind or withhold its policy of treating paid holidays as time worked for overtime purposes or to deprive the employees of the benefits thereof or to refrain from making reference to such policy in communications with employees. Reference to such policy in its March 4, 1960 communication to employees and adherence thereto did not constitute an unfair labor practice or evidence thereof.

(20) Respondent would have been guilty of a violation of the law had it cancelled, rescinded or withheld its policy in respect to holiday-overtime and the benefits thereof because of the advent of union organizational activity or the initiation or pendency of the representation proceeding.

(21) The establishment of respondent's holiday-overtime policy and the effectuation and announcement thereof did not constitute an unfair labor practice or evidence of an unfair labor practice.

(22) For sometime prior to January 1, 1960, respondent's work week consisted of 49½ hours work, beginning on Friday with a half day of work on Saturday. Employees were paid weekly on Friday. In scheduling time off for vacations, the vacation week began on Friday and ended the following Thursday. (R. 24-26, 73-78)

62 (23) As the number of employees increased, it became increasingly difficult for the payroll department to close the payroll for the week on Thursday and to make payment to the employees the next day. Because of this difficulty and in order to continue paying employees on Friday, on January 6, 1960, respondent changed the work week so that it began on Thursday and closed the following Wednesday, thereby giving the payroll department an added day in which to work the payroll and issue the pay checks. This change in the work week is not in issue in the case. (Resp. Ex. 8, R. 24-26, 73-78)

(24) When respondent changed the work week, it also changed the scheduling of time off for vacations so as to begin on Monday instead of on Friday. Adherence to the previous schedule of Friday through Thursday would not have coincided with either the work week or the calendar week. In changing the vacation week so as to accommodate it either to the work week or the calendar week, respondent chose the latter. The amount of the vacation allowance, i.e., time off from work with pay was not changed. Employees continued to receive 5½ work days off for a week of vacation with 49½ hours pay as they had previously. Under the new schedule, employees started their vacation week on Monday. Thus, they get off work at noon on Saturday for their regular day and one-half for rest (Saturday afternoon and Sunday) for which they receive no pay while working or while off for vacations. They are then off work on vacation from Monday through Saturday noon which is time they would have worked except for vacation and for which they are given vacation pay
63 following which they are off Saturday afternoon and Sunday, as usual. (R. 24-26, 73-78)

(25) Respondent began scheduling vacations under the new schedule prior to the issuance of the Board's decision

and direction of election in the representation proceeding. (Resp. Exs. 9, 10, and 11, R. 78-83, 94-95)

(26) Respondent was not required, under the undisputed facts of the case, to continue scheduling time off for vacation purposes as it had in the past because of the pendency of the representation proceeding.

(27) Respondent was not required to cancel, rescind or withhold the changed scheduling of time off for vacation purposes because of the issuance of the Board's decision and direction of election.

(28) The failure of respondent to issue a bulletin in January, 1960, in respect to the change in scheduling time off for vacation purposes does not give rise to or support any inference or finding adverse to respondent.

(29) General Manager McDonald testified under oath positively, and without contradiction or impeachment that the change in scheduling time off for vacations was due to the change in the work week, that it was made at the same time, that it was not for the purpoes of interfering with, restraining or coercing employees in the exercise of their rights under the Act, and that the pendency of the representation proceeding had nothing to do with it.
64 There is nothing in the record to support a contrary finding or conclusion. (R. 24-26, 74-78, 84)

(30) The changing of the schedule of time off for vacation purposes under the undisputed facts of the cases did not constitute an unfair labor practice or evidence of an unfair labor practice.

(31) The General Counsel did not meet the burden of proof that was his in sustaining the allegations of the complaint or any of them in respect to unfair labor practices and in consequence, the complaint should be dismissed.

(32) The allegations of the complaint in respect to unfair labor practices are not supported by and are contrary to the substantial evidence and the law and the complaint should be dismissed.

V.

The following findings and conclusions, and each of them, are not supported by substantial evidence and are contrary thereto:

(1) "During December, 1959, the company held its usual Christmas party x x x, but McDonald made no mention of the additional floating holiday, *as he had done in the past.*" (I.R. p. 34, l. 15-18)

(2) "McDonald explained that in 1959 the regular work week was extended to 49½ hours, 5½ days x x x". (I.R. p. 36, l. 1-3)

65 (3) "x x x and one employee who took his vacation about February 19, was informed his vacation time would be computed under the new system." (I.R. p. 37, l. 20-22)

(4) "The record plainly shows that the sixth holiday was announced on February 25, nine days after the decision in the representation case x x x". (I.R. p. 38, l. 11-13)

(5) "Thus x x x, he did not, as customary, announce the holiday at the annual Christmas party that year. This failure, McDonald attributed to the fact that a study was being made x x x. Despite the completion of the study, around the first of January, 1960, McDonald decided to delay the announcement of the holiday until a party could be arranged later that month." (I.R. p. 38, l. 29-28)

(6) "x x x although the birthday survey was completed around the first of January, nevertheless, no declaration was made until the party of February 25." (I.R. p. 39, l. 3-5)

(7) "x x x, it could have posted a bulletin to that effect or sent letters to the employees *as it had in the past and did thereafter.*" (I.R. p. 39, l. 8-10)

(8) "Instead, the company elected to wait until after the issuance of the Board's Decision and Direction of Election which demonstrates to me that the action was designed to interfere with, restrain, and coerce the employees in the

66 exercise of their rights guaranteed under the Act and to influence the outcome of the election rather than any inability to find a suitable place for the party." (I.R. p. 39, l. 10-16)

(9) "Equally without merit is McDonald's explanation of the payment of holiday overtime." (I.R. p. 39, l. 18-19)

(10) "x x x he waited until his letter of March 4, 1960, to announce this benefit to the employees". (I.R. p. 39, l. 27-29)

(11) "Manifestly, this charge became effective July 4, 1960, or the birthday of the employee." (I.R. p. 39, l. 29-30)

(12) "x x x this was a change in conditions of employment and a benefit to the employees." (I.R. p. 40, l. 7-8)

(13) "Admittedly, the initial general announcement of this benefit was made in the Company's communication to the employees of March 4. McDonald sought to explain this away x x x". (I.R. p. 40, l. 8-11)

(14) "x x x in February, one employee had been advised he could take his vacation under this policy." (I.R. p. 40, l. 13-14)

(15) "x x x at or about the time of the issuance of the Board's Decision x x x one employee was permitted an additional weekend on his vacation." (I.R. p. 40, l. 16-19)

67 (16) "McDonald's explanations, x x x, amount to nothing more than an attempt to prove that x x x the Company was not motivated by any unlawful considerations." (I.R. p. 40, l. 28-33; p. 41, l. 1)

VI.

The Examiner erred in respect to each of the following statements, findings and conclusions:

(1) "While McDonald offered explanations for the Company's actions, they are neither convincing nor persuasive." (I.R. p. 38, l. 17-19)

(2) "Frankly, I see no reason why McDonald could not have followed custom and announced the holiday at the

Christmas party, or at least inform the employees the birthday holiday was then under consideration." (I.R. p. 38, l. 32-33; p. 39, l. 1-2)

(3) "Had the company been interested in merely notifying the employees that a sixth holiday had been granted, be it a floating one of their birthday, it could have posted a bulletin to that effect or sent letters to the employees as it had in the past and did thereafter. Instead, the company elected to wait until after the issuance of the Board's Decision x x x which demonstrates to me that the action was designed to interfere with, restrain, and coerce the employees in the exercise of their rights guaranteed under the Act and to influence the outcome of the election rather than any inability to find a suitable place for the party." (I.R. p. 39, l. 5-16)

68 (4) "Equally without merit is McDonald's explanation of the payment of holiday overtime. First, I fail to see how the bulletin declaring the payment of 4½ hours at regular or overtime rates for July 4, 1959, can be construed as a statement of policy that all holidays would be paid on that basis. x x x I find it difficult to believe that had the Company established such a policy, the accounting department would have failed to carry it out or that there would have been no complaints from the employees x x x". (I.R. p. 39, l. 18-33; p. 40, l. 1)

(5) "x x x I do not consider as significant the fact that at or about the time of the issuance of the Board's Decision x x x that one employee was permitted an additional weekend on his vacation. (I.R. p. 40, l. 16-19)

(6) "As I view the evidence, McDonald's excuses are nothing more than pretexts to justify the Company's actions in announcing the granting of the foregoing benefits in order to interfere with, restrain, and coerce the employees in the exercise of their rights guaranteed under the Act and to influence the results of the election." (I.R. p. 40, l. 21-26)

(7) "McDonald's explanation amounts to nothing more than an attempt to prove that x x x the company was not motivated by any unlawful considerations. However, motive

is neither controlling nor material," (I.R. p. 40, l. 28-33; p. 41, l. 1) for the reason that said statements, findings, and conclusions and each of them

69 (a) evidence and stem from the fact that the Examiner thereby improperly and unlawfully placed the burden on respondent of convincing him that it was not guilty of an unfair labor practice instead of recognizing and giving effect to the fact that the burden was and is on the General Counsel to prove the allegations of the complaint by a preponderance of substantial evidence;

(b) are based upon surmise, suspicion and conjecture and not upon substantial evidence;

(c) are contrary to the positive, sworn, uncontradicted, and unimpeached testimony of General Manager McDonald on the exact same points;

(d) are contrived argumentative rationalizations designed to furnish the basis for a holding against respondent which evidence and are supported only by the Examiner's attempted substitution of his administrative omniscience and second-guessing for the rule and guide laid down by the Act in determining what respondent could or should have done under the law; and

(e) are unreasonable, unwarranted, unlawful, arbitrary, and capricious.

VII.

The Examiner's erroneous attitude toward and his concept and treatment of the complaint and of the Record which characterize his Intermediate Report are reflected additionally in his clearly erroneous ruling that on

70 cross examination, Respondent was permitted to impeach only its own witnesses and that it could not impeach an adverse witness. (R. 122)

VIII.

The Examiner erred in overruling and denying each of Respondent's several motions to dismiss. (R. 44, 95)

IX.

The Board's decision in *American Freightways Company, Inc.*, 124 NLRB 146 (1959), cited by the Examiner, is clearly

inapposite and furnishes no basis or authority for a holding against Respondent.

X.

The finding and conclusion of the Examiner that Respondent interferred with, restrained, and coerced its employees in violation of Section 8(a)(1) of the Act (I.R., p. 41, l. 20-25) is not supported by and is contrary to the substantial evidence and the law.

XI.

Respondent excepts to each statement, finding, conclusion, and recommendation set forth in the section of the report headed "V. The Remedy" (I.R. pp. 45-48) because they are not supported by and are contrary to the record and the law, excepting only "Conclusions of Law", numbered 1 and 2.

71 *Case No. 16-RC-2637*

A.

Employer objects and excepts to each of the following findings, conclusions, and recommendations:

(1) "Having found that the Company engaged in conduct in violation of Section 8(a)(1), I further find that it thereby interfered with the election conducted on March 18, 1960." (I.R., p. 41, l. 27-29)

(2) "I have already found that the Company by announcing and granting economic benefits and by changing conditions of employment thereby engaged in conduct in violation of Section 8(a)(1) of the Act, so I recommend that Objection 1a, which covers such benefits, be sustained." (I.R., p. 42, l. 9-13)

(3) "Having found that the unlawful activities of the Respondent took place at a time when employees were being asked to indicate their free choice of a bargaining representative in an election directed by the Board, the Respondent thereby interfered with this free choice. I therefore recommend that the results of the election, held on March 18, 1960, be vacated and set aside and that a new election be held at a suitable time after the effects of the unfair labor

practices have been dissipated." (I.R., p. 45, l. 30-33; p. 46, l. 1-15)

(4) "Because of the Respondent's interference with and coercion of the voters in the election of March 18,
72 1960, thereby depriving voters of a free choice in the election, the election should be set aside." (I.R., 46, l. 1-5)

(5) "I further recommend that the election of March 18, 1960, be set aside and that the Board order a new election be held at a suitable time after the effects of the unfair labor practices have been dissipated." (I.R., p. 48, l. 28-31)

As reasons and grounds for such objections and exceptions, Respondent adopts the objections and exceptions and the reasons and grounds therefor set forth above in respect to Case No. 16-CA-1357. In addition, Respondent submits that the foregoing findings, conclusions, and recommendations are not supported by and are contrary to the record and the law and that the objections of the Petitioner should be overruled and denied and the results of the election certified to the parties.

Respectfully submitted,

(Signed) KARL H. MUELLER
Karl H. Mueller

(Signed) HAROLD E. MUELLER
Harold E. Mueller
Attorneys for Exchange Parts Co.

MUELLER & MUELLER
502 Burk Burnett Bldg.
Fort Worth 2, Texas

---

73 **Certificate of Service**

(Omitted in printing)

Order Granting Motion, Severing Cases and Permitting Withdrawal of Petition—March 23, 1961

On July 14, 1960, the Regional Director for the Sixteenth Region issued an Order Consolidating Cases, Notice of Hearing on Objections and Order Rescheduling Hearing in the above-entitled proceeding. A hearing was conducted pursuant thereto, and on February 2, 1961, Trial Examiner Reeves R. Hilton issued his Intermediate Report. Thereafter, on March 6, 1961, the Union filed a motion to withdraw its objections to conduct affecting results of the election conducted on March 18, 1960, to withdraw, without prejudice, its Petition for Certification of Representatives in Case No. 16-RC-2637, and that Case No. 16-RC-2637 be severed from Case No. 16-CA-1357. On March 17, 1961, the Employer filed a reply in opposition thereto. The Board having duly considered the matter,

IT IS HEREBY ORDERED that the Union's Motion be, and it hereby is, granted; and

IT IS FURTHER ORDERED that Cases Nos. 16-CA-1357 and 16-RC-2637 be, and they hereby are, severed; and

IT IS FURTHER ORDERED that the Petitioner's motion to withdraw its objections to conduct affecting results of the election be, and it hereby is, granted; and

IT IS FURTHER ORDERED that the Petitioner's motion to withdraw its petition in Case No. 16-RC-2637 be, and
75 it hereby is, granted, and that the case be, and it hereby is, closed.

Dated, Washington, D. C., March 23, 1961.

By direction of the Board:

HOWARD W. KLEEB
Associate Executive Secretary

BEFORE THE NATIONAL LABOR RELATIONS BOARD

131 NLRB No. 98

D-2170
Fort Worth, Texas

Decision and Order—May 26, 1961

On February 2, 1961, Trial Examiner Reeves R. Hilton issued his Intermediate Report in the above-entitled proceeding, finding that the Respondent had engaged in and was engaging in certain unfair labor practices alleged in the complaint in Case No. 16-CA-1357 and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the copy of the Intermediate Report attached hereto. The Trial Examiner also sustained certain objections to the conduct of a Board-ordered election in Case No. 16-CA-2637 and recommended
76 that the election be set aside. Thereafter, the Respondent filed exceptions and objections to the Intermediate Report.[1]

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its powers in connection with this case to a three-member panel.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Intermediate Report, the exceptions, and the entire record in the case, and hereby adopts the Trial Examiner's findings, conclusions, and recommendations.

ORDER

Upon the entire record in this case and pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Exchange Parts Company, Fort Worth, Texas, its officers, agents, successors, and assigns shall:

---

[1] On March 23, 1961, pursuant to a motion filed by the Petitioner in 16-RC-2637, the Board entered an order permitting withdrawal of the petition in that case and severing Cases Nos. 16-RC-2637 and 16-CA-1357, which had previously been consolidated. As Case No. 16-RC-2637 was thereby closed, we do not rule on any of the Respondent's exceptions and objections insofar as they relate only to Case No. 16-RC-2637.

1. Cease and desist from:

(a) Interfering with, restraining, or coercing its employees in the exercise of rights guaranteed in Section 7 of the Act by granting them economic benefits or by
77 changing the terms and conditions of their employment; provided, however, that nothing in this recommended order shall be construed as requiring the Respondent to vary or abandon any economic benefit or any term or condition of employment which it has heretofore established;

(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of the right to self-organization, to form labor organizations, to join or assist International Brotherhood of Boilermakers, Iron Shipbuilders, Blacksmiths, Forgers and Helpers, AFL-CIO, or any other labor organization, to bargain collectively through representatives of their own choosing and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection or to refrain from any or all such activities.

2. Take the following affirmative action, which the Board finds will effectuate the policies of the Act:

(a) Post at its plant in Fort Worth, Texas, copies of the notice attached hereto marked Appendix.[2] Copies of said notice, to be furnished by the Regional Director for the Sixteenth Region, shall, after being duly signed by the Respondent's authorized representative, be posted for sixty (60) consecutive days thereafter in conspicuous places, including all places where notices to employees customarily are posted. Reasonable steps shall be taken by the
78 Respondent to insure that said notices are not altered, defaced, or covered by any other material;

(b) Notify the Regional Director for the Sixteenth Region, in writing, within ten (10) days from the date of this

---

[2] In the event this Order is enforced by a decree of a United States Court of Appeals, the notice shall be amended by substituting for the words "PURSUANT TO A DECISION AND ORDER" the words "PURSUANT TO A DECREE OF THE UNITED STATES COURT OF APPEALS, ENFORCING AN ORDER."

Order, as to what steps the Respondent has taken to comply herewith.

Dated, Washington, D. C. May 26, 1961

Frank W. McCulloch,
Chairman

Boyd Leedom,
Member

John H. Fanning,
Member

National Labor Relations Board

(Seal)

---

79 APPENDIX

Notice to All Employees Pursuant to a Decision and Order

of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby notify our employees that:

We Will Not interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed in Section 7 of the Act by granting them economic benefits, or by changing the terms or conditions of their employment; *Provided*, however, that nothing in this Decision and Order requires us to vary or abandon any economic benefit or any term or condition of employment which has heretofore been established.

We Will Not in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the right to self-organization, to form labor organizations, to join or assist International Brotherhood of Boilermakers, Iron Shipbuilders, Blacksmiths, Forgers and Helpers, AFL-CIO, or any other labor organization, to bargain collectively through representatives of their own choosing and to engage in concerted activities for the purpose of collective bargaining or other mutual aid of protection or to refrain from any or all such activities.

All our employees are free to become, to remain, or to refrain from becoming or remaining members of labor organization of their own choosing.

EXCHANGE PARTS COMPANY
(Employer)

Dated ..... By .....
(Representative) (Title)

This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced, or covered by any other material.

BEFORE THE NATIONAL LABOR RELATIONS BOARD
SIXTEENTH REGION

Case No. 16-CA-1357

In the Matter of:

EXCHANGE PARTS COMPANY

and

INTERNATIONAL BROTHERHOOD OF BOILERMAKERS, IRON SHIPBUILDERS, BLACKSMITHS, FORGERS AND HELPERS, AFL-CIO

Case No. 16-RC-2637

EXCHANGE PARTS COMPANY, REBUILDERS SERVICE COMPANY, SOUTHWEST SHOE EXCHANGE COMPANY, *Employer*

and

INTERNATIONL BROTHERHOOD OF BOILERMAKERS, IRON SHIP-BUILDERS, BLACKSMITHS, FORGERS AND HELPERS, AFL-CIO, *Petitioner*

Room 2144,
300 West Vickery,
Fort Worth, Texas,

Trapscript of Hearing—Friday, September 9, 1960

Pursuant to notice, the above-entitled matter came on for hearing at 10:00 o'clock a. m.

BEFORE:

REEVES R. HUTON, Trial Examiner.

Appearances:

JOSEPH P. PARKER, ESQ., 300 West Vickery, Fort Worth, Texas, appearing as counsel for the General Counsel.

82 MR. J. M. SCOTT, AFL-CIO Representative, 1318 Continental National Bank Building, Fort Worth 2, Texas, appearing on behalf of Union.

MR. A. J. EBERHARDY, International Vice President-Director of Organization, 570 New Brotherhood Building, Kansas City 1, Kansas, appearing on behalf of Union.

MR. B. FALLS, Business Manager, 312 Majestic Building, Fort Worth, Texas, appearing on behalf of Union.

MR. C. V. MCDONALD, Vice President-General Manager, 2500 West Vickery, Fort Worth, Texas, appearing on behalf of Employer.

KARL H. MUELLER, ESQ., and HAROLD E. MUELLER, ESQ., Burk Burnett Building, Fort Worth, Texas, appearing on behalf of Employer.

. . . . . .

83 **Motions to Amend Complaint and Answer, and Granting Thereof**

Mr. Parker: At this time I would like to move to amend the complaint making Paragraph No. 3 A, the International Brotherhood of Boilermakers, Iron Shipbuilders, Blacksmiths, Forgers and Helpers, AFL-CIO, is a labor organization within the meaning of the Act, Section 2, Subsection 5.

Mr. Karl Mueller: No objection, Mr. Examiner, and if it is approprate for us to do so we would move to amend our answer, so as to admit that allegation.

Trial Examiner: Very well. The motion to amend, as well as the motion to amend the answer, in the manner stated by counsel is granted.

Mr. Parker: I would like to amend the complaint and number this Paragraph 3 B, the Respondents are now and have been at all times material herein an employer engaged in commerce within the meaning of Section 2, Subsection 6 and 7 of the Act.

Mr. Karl Mueller: No objection, Mr. Examiner.

84 Trial Examiner: All right. The motion to amend is granted.

• • • • • • • • • • •

C.V. McDONALD, a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

85 Trial Examiner: Will you state your name for the record?

The Witness: C. V. McDonald.

Trial Examiner: Where do you live, Mr. McDonald?

The Witness: 4115 Bellaire Drive South.

Trial Examiner: Is that Fort Worth?

The Witness: Fort Worth.

Trial Examiner: Go ahead, Mr. Parker.

Mr. Parker: In order to facilitate the testimony of Mr. McDonald, I would like to offer this stipulation.

The representation petition that was filed in 16-RC-2637 was filed on November 16, 1959. A representation hearing on the aforementioned petition was held on December 29, 1959. The Board issued its order and direction of election in the mentioned matter on February 19, 1960, and the election was held on March 18, 1960.

I would now like to offer that stipulation.

Mr. Karl Mueller: Mr. Examiner, the Respondent is in this attitude. It does not question the accuracy of the facts stated, but it does object to the relevance and materiality of the matter embraced in the proffered stipulation. It doesn't go to any issue.

Trial Examiner: Well, the Board's records will show that the petition was filed on such and such a date, and a hearing was held, and the decision was issued on such and such a date, and an election was held. I think I can

86 take judicial notice of it anyway.

• • • • • • • • • • •

Direct Examination

Q. (By Mr. Parker) Mr. McDonald, are you employed by Exchange Parts Company? A. Yes.

Q. What is your position with Exchange Parts? A. Vice president and general manager.

Q. You are an officer of the corporation, are you not? A. Yes, sir.

Mr. Parker: I would like permission to examine this witness under Rule 43-B.

Trial Examiner: Any objection?

Mr. Karl Mueller: None.

Trial Examiner: All right. Go ahead.

• • • • • • • • • •

87 Q. (By Mr. Parker) Do you recall receiving a copy of a representation petition that was filed in November of 1959? A. Sometime in November. I don't recall the exact date.

Q. All right, sir. Now, shortly thereafter the company initiated social parties for the employees, did they not? A. That's wrong.

Q. That is wrong? A. Yes.

Q. Will you tell us what is right? A. You said shortly thereafter. It happened before.

Q. It happened before? A. (Nods head yes.)

88 Q. You did have your first social party in November 1959, did you not? I mean other than Christmas parties in previous years? A. No. That wasn't the first social party.

Q. When was your first one? A. I will have to go back in the records to find out. Those social parties date back to 1951 and '52.

Q. I am talking about the year of 1959. How many social parties did you have during the year 1959? A. There, again, I would have to go back and look at the records. I don't recall, but that was not the first, I am sure of that.

Q. You did have one in November 1959, did you not? A. We did have one on November 4, I believe it was.

Q. You had another one in December? A. Yes.

Q. All right, sir. And at these parties all employees and their families were invited to attend? A. That's right.

Q. Now, each year the company has had a Christmas party for the employees; is that correct? A. As far back as I can recall.

Q. All right, sir. Now, 1959, what was the date of your Christmas party, do you recall? Was it December 22nd? A. I don't know the exact date. I sure don't. It's available in the records, however.

Q. It was somewhere around Christmas of 1959?

89 A. Yes.

Q. Was that the only social function during December? A. Yes. It was.

Q. All right, sir. Now, on February 25, 1959, in the Pioneer Palace at Fort Worth you also had a social function, did you not?

Now, at that function, did you announce that another holiday would be granted? A. We announced, and also took a vote at that time as to when it would be.

Q. Now, when you took this vote at that time, as to when it would be did the company propose to the employees what type holiday should be observed, a floating holiday or their birthday? A. Yes.

Q. And as I understand it, the employees voted on it, and voted that the birthday be the additional holiday? A. Yes.

Q. And at this meeting February 24th, when this holiday was announced, did you make a speech to the employees in regard to the pending election and the union? A. No.

Q. Was there anything said about the union at this meeting or the pending election? A. No.

90 Q. Well, Mr. McDonald, it has been a long since this has occurred, and I would like to show you your affidavit to refresh your memory, the bottom portion of the first page of the affidavit.

That is your signature, is it not? A. Now, would you restate your question?

Q. All right, sir. That is your signature? A. Yes. That's right.

Q. You recall giving this affidavit to Mr. Vasse? A. Yes. That's right.

Q. My question was, is that the meeting that you announced the additional holiday, and was anything said about the pending election that was forthcoming? A. There was

attention called that there was to be an election, and the date was set.

Q. You told the employees the NLRB in Washington had directed the election to be held among the employees? A. (Nods head affirmatively.)

Q. And to determine whether or not the employees wished to hand over their rights to speak and act for themselves? A. Yes.

Q. And the rights of EPCO to deal direct for the employees through the union? A. Uh-huh.

91 Q. Was there anything said, or do you recall anything being said about the Union organizing when you made this speech to them? A. Yes. It was said that he had twisted some of the facts around in his bulletins and poop sheets that he was sending out, the things that we had done for the employees in the past that he had twisted them around to make them put us in a bad light.

Q. And then you mentioned to them that, the other improvements and changes in the past year, when there was no threat of a union? A. That's right.

Q. Do you recall mentioning that? A. Yes.

Q. And then I believe you urged everyone to vote in the election? A. Yes.

Q. Mr. McDonald, what other benefits did Exchange Parts grant to the employees during 1960, do you recall? A. Well—

Q. Maybe this will help you, Mr. McDonald. I show you what purports to be a letter sent out by you and Mr. Bishop. I believe Mr. Bishop is president; is that correct? A. Yes.

Q. Dated March 4, 1960, to all employees. Attached to the letter is the company's schedule of benefit plan,

92 is it not? A. Uh-huh.

Q. If you like, you might read what you listed on the letter as 1960 benefits. A. The sixth paid holiday. Of course, in that letter it mentions Social Security, but that is something of course we have to pay.

Q. We are not interested in that. A. Now, the recreational activities mentioned was started in 1959 and continued through 1960.

Q. All right, sir. A. In 1960, of course, we added baseball teams as the spring came on.

Q. All right. Now, I notice, "No loss of overtime pay during the week a paid holiday is given. This will mean $5.00 to $6.00 more per employee per holiday." Is that a true statement? A. No. That was made in 1959.

Q. It is listed under 1960 benefits. A. That is an error there then.

Q. All right. Let's get into that. Will you explain just what this means? This sentence I just read about no loss of overtime pay. A. Previously, and without realizing, we were giving holidays. As we would give a holiday— See,

93 our regular work week extended to 49½ hours a week, and in giving the holidays previously we had been paying straight time on the nine hours instead of considering it as time worked. And in 1959 that came to my attention that actually it was not a full holiday, practically about a half a holiday that they were getting. They were receiving less pay in the week in which they received the holiday than had they worked. That wasn't the intentions of the company, so a bulletin was issued on our first holiday in 1959, which is July 4th, I believe is our first holiday, and at that time it was corrected and they were paid at that time the same as if they had worked.

Q. Now, as I understand it, on the July 4th holiday 1959, when the holiday occurred that was using the computation of overtime— A. Yes.

Q. —towards work. A. Just as if it had been worked.

Q. As if it had been worked. Prior thereto it had not been done. A. It had not been done.

Q. Now, after July 4, 1960, holiday, was the same computation made? A. No. It was an error made on our accounting department for Thanksgiving and Christmas.

Q. And the day after Christmas? A. And the

94 floating holiday which followed after Christmas, which was discovered as we were going over some things for this hearing, I believe, was talking with the attorneys we discovered it then, that it had been overlooked in the accounting department.

Q. Now, did you use this computation for January of 1960 covering New Year's Day holiday? A. We don't have a holiday on New Year's Day.

Q. Oh, I beg your pardon. Now, as far as making an announcement to the employees, is this the first time that this was announced to the employees by this letter of March 4? A. No. I know there was a bulletin put out when the first holiday occurred in '59 incorporating—

Q. Other than that bulletin, when you caught this and began to pay them again, is this the first announcement that was made that the holiday would then be computed and used in overtime? You put out no other bulletins, did you? A. No.

Q. All right, sir. And now we have a 1960 benefit listed as, "Vacation time extended 1½ days." Would you tell us how the vacation was extended on and a half days? A. Well, in January beginning of this year, the number of employees had increased to the extent that we had to change our pay period time and give the office and accounting department more time to get the checks and do their accounting. We changed that from a Friday to a

95 Wednesday, still pay on Friday, but the pay period had been Thursday through—let's see. Friday through Thursday originally. We changed it to Wednesday to give us another extra day for accounting. Previously we had been—vacations had been figured on a work week starting on Friday and ending on Thursday.

Q. They had to start their vacation on Friday and end it on Thursday? A. Yes. It was for accounting purposes that we started our vacations that way. Then when we had to change it back to give us more lead time in our accounting, that was pushing the vacations back to the middle of the week again, so when we made one change we just made both changes and changed that where they could have a calendar week, we will say, instead of a pay period week.

Q. And as a result of this change, it meant they would get another weekend in during their vacation; is that not correct? A. They would get another weekend. Of course, that cost the company no money at all. It was just a matter of them being able to—

Q. I realize, but they did get another Saturday or Sunday or Friday with their vacation? A. Not a Friday, no.

Q. Well, a Saturday and a Sunday as a result of this change? A. No. They get another half a day, a Saturday, and a Sunday. They work a half a day Saturday.

96 Q. Oh, I follow you. So they get a day and a half.

A. It actually meant they could add to their vacation time that they are away from the job a day and a half altogether.

Q. Now, was this announced to the employees in this letter you sent to them on March 4? A. Well, that decision was made when we made our change in our payroll period. It was made in January.

Q. All right. In January was it announced to the employees then? The announcement wasn't made in January, was it? A. Evidently it must have been known, because we had vacations starting in February.

Q. My question is, in what means did you announce this to the employees, all of the employees out there, to make them aware of this? A. As far as I know as a general announcement. It was in that bulletin. The people that took vacations knew about it at the time they took vacations.

Q. In other words, a general announcement was made in this March 4 letter to the employees with your benefits attached? A. Yes.

Q. Now, Mr. McDonald, you mentioned you had a bulletin, did you not, and the fact you were going to pay this overtime in January of 1960, that you issued a bulletin? A. There was a bulletin issued on that.

97 Q. Do you have a copy of that bulletin? A. We have one in our files.

The Witness: Do you have that, Mr. Mueller?

Mr. Karl Mueller: Yes. We anticipated Joe might want to see it.

Q. (By Mr. Parker) Now, in regards to this July 4 holiday, Mr. McDonald, I think you did but I am not sure, but as I understand it that is the only holiday during 1959 that the holiday was used in the computation of overtime; is that correct? A. That is correct.

Q. And the rest of them were paid just as straight time, as you had previously done? A. It was done through error; that is correct.

Q. During the union campaign, Mr. McDonald, it was quite an intensive campaign, with the union passing out many leaflets, and the company replying with many leaflets; is that correct? A. That's right.

Q. And also the company having various meetings within the plant at various times to explain to the employees your feelings? A. That's right.

(Thereupon, the document above referred to was marked General Counsel's Exhibit No. 2 for identification.)

Q. (By Mr. Parker) I have marked for identification General Counsel's Exhibit No. 2, being a letter to the employees, dated March 4, 1960, and purportedly signed by Mr. C. V. McDonald and Mr. R. S. Bishop. Attached thereto is, "Facts You Should Know About Your Benefits At EPCO," which is a resume of the history of the benefits over the years, and attached thereto is a pink leaflet. A. Yes.

98

Offer in evidence

Mr. Parker: I would now like to offer this into evidence.

. . . . . .

(The document heretofore marked General Counsel's Exhibit No. 2 for identification was received in evidence.)

Q. (By Mr. Parker) Now, Mr. McDonald, this letter was sent to all of the employees, was it not? A. To the best of my knowledge, it was.

Q. And the entire exhibit was sent to them? A. (Nods head affirmatively.)

Mr. Parker: I have no further questions.

Trial Examiner: Go ahead, Mr. Mueller.

99 Mr. Karl Mueller: I think we will reserve our examination, if we may, Mr. Examiner, until the time comes for us to put on our case.

. . . . . .

M. D. TOWNLEY, a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

100 Direct Examination

Q. (By Mr. Parker) . . .

. . . . . .

Q. During the course of your employment, has the company had various social functions during the time you have

worked at Exchange Parts? Has the company sponsored various social functions, such as parties? A. Yes, sir.

Q. All right. In 1957 would you state how many
101 you recall that were sponsored, how many social functions, parties? A. Christmas party.

Q. Christmas party? A. (Nods head affirmatively.)

Q. In 1958 how many do you recall having been sponsored? A. Christmas.

Q. All right. In 1959 how many parties do you recall having been sponsored? A. Two.

Q. When were they held? A. November and the Christmas party.

Q. That was in December, the Christmas party? A. (Nods head affirmatively.)

Q. All right. Mr. Townley, I show you what has been marked as General Counsel's Exhibit No. 2. Did you ever receive one of these from the company? A. Yes, sir.

Q. All right, sir. Now, on this exhibit under 1959 it shows that a fifth paid holiday was added. It says, "Extra day at Christmas." Do you see that on there? A. Uh-huh. Yeah, I see it.

Q. All right. Now, it has been some time since 1959, but as best you can recall, do you recall the company announcing the fact that you would have this extra day after Christmas? A. They announced that they would
102 have an extra day, but I don't believe that they said—this is in November I am talking about.

Q. November 1959? A. Yeah, but I believe they said we would have an extra day, but they hadn't decided what day it would be on.

Q. Was anything said about a floating holiday? A. It would be a floating holiday, but they hadn't never posted it yet.

* * * * * * * * * * *

103 Cross Examination

Q. (By Mr. Karl Mueller) * * *

* * * * * * * * * * *

104 Q. Now, you have indicated, Mr. Townley, that there was a company party in November of 1959.

Do you remember where that was? A. That was at the plant in the cafeteria there.

. . . . . .

105 Q. Do you remember what was discussed, if anything, at that party? What took place there? Why you were there A. Well, it was the one where they were going to add a holiday. That was in November, and he added a holiday, but I don't recall. Anyway, he said it would be a floating holiday, and he hadn't decided for sure when it would be, I mean at that present time. I mean what day it would fall on.

. . . . . .

107 Q. Do you recall anything having been said in 1959 about the fact that the company had been adding a holiday each year, and that another one would be added in 1960? A. I don't remember. I heard Mr. Mc say that, but I forgot whether it was November or in December or when it was, that I heard him say there would be one added.

Q. All right, sir. Now, I think you have indicated that you went to a meeting in February, February 25, 1960?

A. Yes, sir. I believe that's right.

108 Q. Well, in February 1960? A. It was in February.

Q. And was it at that meeting that the employees voted on whether your sixth holiday would be a floating holiday or the employee's birthday? A. I believe they had a vote that they would have it on their birthday as it come up. I believe that was the way it was voted in.

Q. Now, do you recall having seen anything before that February 25 meeting about the holiday possibly being the employee's birthday? A. Well, they were undecided where they was going to place it, I believe. He said he would add it. Mr. Mc said he would add the holiday, but in November it was still floating, as far as where it would be for sure.

. . . . . .

109 Q. Do you recall that some two weeks or more before this February 25th meeting, 1960, Mr. Mc explained why the January meeting had not been had, because Pioneer Palace was tied up in connection with the Stock Show? A. I believe so. Yes, sir.

. . . . . .

Mr. Parker: At this time, we would like to stipulate that what has been marked for identification as Respondent's Exhibit 1 is the bulletin which Mr. C. V. McDonald testified to in reference to the July 4th holiday.

(Thereupon, the document above referred to was marked Respondent's Exhibit No. 1 for identification.)

Mr. Parker: Would you like to offer it, Karl, or do you want me to offer it?

Trial Examiner: Since it was done by way of stipulation, I suppose it doesn't make too much difference.

Mr. Karl Mueller: No. It doesn't. We join in the stipulation, Mr. Examiner.

Trial Examiner: All right. The stipulation may be received in evidence, and the exhibit may also be received in evidence as Respondent's Exhibit No. 1.

112 Q. All right, sir. Mr. Mc, are you familiar with the facts concerning the establishment of a holiday policy by the company, if in fact such a policy was established? A. Yes. I am. I established it.

Q. All right. Now, in that connection, may we ask you when it was? A. 1955.

Q. And at that time did you have to do, Mr. Mc, in your position as vice president and general manager, with the making and the administration of the company's policies in regard to employer-employee matters, as well as other matters? A. I did.

Q. Involving the company's operations? A. I did.

Q. And have you exercised that function and served in that capacity continuously since then? A. I have.

Q. All right. What, if anything, was done in 1955 by you on behalf of the company in respect to the establishment of a holiday policy? A. In 1955 was first year we established any policy at all, or we had any holiday. We established the first holiday, which was Christmas, and at which time we announced that there would be a holiday added each year until further notice, and that we did. We added a holiday in '56, which was Thanksgiving.

113 In 1957 it was Labor Day.

In 1958 it was July 4th.

And in 1959 was the floating holiday.

In 1960 was the birthday holiday.

Q. Did you personally announce that policy? A. I did.

Q. At the Christmas party? A. At the Christmas party in 1955.

Q. In 1955? A. Uh-huh.

Q. And have you abided by that statement or policy each year since that time? A. We have.

Q. Have you yet notified the employees that you would not continue with that policy and grant another paid holiday? A. I have not.

Q. Mr. Mc, as you know there is testimony in the record concerning a meeting or meetings of employees and their families in November of 1959. I have forgotten whether you testified about that or not. What are the facts in that regard, as to whether or not such meetings were held, and, if so, when? A. There was two meetings held. One on November 4th, and one on November 5th. They were held immediately after I came back from a APRA convention in New Orleans on November 1st.

114 Q. What convention was that? A. APRA, Automotive Parts Rebuilders Convention.

Q. Now, at the time those meetings were held on November 4 and 5, 1959, did you have any knowledge or information directly or indirectly concerning any organization or union activity among any of the employees of the companies? A. No.

Q. Do you remember when it was that you were first aware of the fact that there were some union or organizational activity among some of the employees in 1959? A. There was a letter written to Mr. Bishop. As I recall it was somewheres around November 12th, 13th or 14th. I can't be for sure, but that's a matter of record. We have it.

Q. All right, sir. A. It was a letter received from the Boilermakers Union, Mr. Tison.

Q. And the receipt of that letter was the first knowledge or information that you had that there had been any union or organizational activity among any of your employees in 1959? A. That is correct.

Q. I hand you what appears to be a photo copy of a letter dated November 9, 1959, on the stationery of the Boilermakers, which I have had marked for identification

as Respondent's Exhibit 2. I will ask you to state whether or not that is a true copy of the letter from the Boilermakers to which you last referred.

115 (Thereupon, the document above referred to was marked Respondent's Exhibit No. 2 for identification.)

A. This is it. Yes.

Offers in Evidence

Mr. Karl Mueller: We offer Respondent's Exhibit 2, Mr. Examiner, if we may.

Mr. Parker: For what purpose?

Mr. Karl Mueller: This is the first time he knew anything about it.

Mr. Parker: Just to acknowledge receipt of the letter?

Mr. Karl Mueller: Just fixing the time, Joe.

Mr. Parker: I have no objection.

Trial Examiner: All right. The letter may be received in evidence and marked as Respondent's Exhibit No. 2.

(The document heretofore marked Respondent's Exhibit No. 2 for identification was received in evidence.)

Q. (By Mr. Karl Mueller) Did you write letters to the employees in respect to these meetings on November 4 and November 5 in 1959 about which you have testified? A. Yes. I did.

(Thereupon, the document above referred to was marked Respondent's Exhibit No. 3 for identification.)

Q. (By Mr. Karl Mueller) I show you a letter on the stationery of Exchange Parts Company, dated
116 November 4, 1959, consisting of two pages. It appears to be a mimeographed production, and appears to bear your signature. Can you identify that, Mr. Mc, as being one of the letters, a copy of which was sent to each of the employees out there at the plant? A. This is it. Yes.

Mr. Karl Mueller: I don't know whether I identified that as Respondent's Exhibit 3. I'm afraid I didn't.

Q. (By Mr. Karl Mueller) Is that the one which I have marked for identification as Respondent's Exhibit 3, Mr. Mc? A. That is it.

Q. And were these letters, of which Respondent's Exhibit 3 is a copy, actually distributed to the employees on November 4? A. That's right. November 4.

Q. 1959? A. That's right.

(Thereupon, the document above referred to was marked Respondent's Exhibit No. 4 for identification.)

Q. (By Mr. Karl Mueller) I show you another mimeographed letter, which appears to bear your signature on the stationery of Exchange Parts Company, dated November 4, 1959, and marked for identification as Respondent's Exhibit 4, and I will ask you if that is also a true copy of letters that were or notices that were given to each of the employees at the plant on November 4,

117 1959? A. Yes. This is it.

Mr. Karl Mueller: We offer Respondent's Exhibits 3 and 4, if the Examiner please.

Mr. Parker: Karl, I notice on Respondent's Exhibit 3 it refers to a questionnaire attached. Is there any reason why that shouldn't go in as being distributed?

Mr. Karl Mueller: No.

Q. (By Mr. Karl Mueller) We don't happen to have a blank questionnaire? A. I have—

. . . . . .

Mr. Parker: I feel like if you are going to introduce it as to what was handed out to the employees that we ought to put it all into evidence, such as this questionnaire it refers to. I fail to see the materiality of this. I object on that basis.

Trial Examiner: Well, subject to your statement and comments with respect to the exhibits, I will receive them in evidence and they may be marked as Respondent's Exhibits 3 and 4.

118 (The documents heretofore marked Respondent's Exhibit Nos. 3 and 4 for identification were received in evidence.)

. . . . . .

Mr. Karl Mueller: Mr. Examiner, in connection with our ofier of Respondent's Exhibit 3, the Examiner will recall that the General Counsel voiced an objection which embraced in part the fact that there was not attached

to the letter a copy of the questionnaire that was referred to in it. During the off-the-record discussion that
119 the Examiner has granted to us, we have exhibited to General Counsel and to Mr. Scott a copy of the questionnaire which we have in our file, which reveals the score that was made as a result of tabulating the results of the questionnaires received.

The questionnaire was a part of an opinion survey which was conducted by Shepherd, S-h-e-p-h-e-r-d, Associates, Fort Worth, headed by Dr. Hilton Shepherd, who for some time has served the company on foremanship training, and that character of thing. And embraced includes such questions as, generally speaking, "How do you think Exchange Parts is run?" And so forth, to sample the opinion of the employees with respect to the company, its standing in the business in which it is engaged, the manner in which its foremen in the company feel and act toward employees, the facilities that were being furnished, good, bad, indifferent, and so forth. I think, after having examined the questionnaire, General Counsel and Mr. Scott have indicated that they would not object to Respondent's Exhibit 3, because of the failure to incorporate with it a copy of the questionnaire.

Mr. Parker: That is correct.

Mr. Scott: That is correct.

Trial Examiner: Very well. The record may so show.

Mr. Karl Mueller: Thank you very much.

Trial Examiner: Continue with your examination.

Mr. Karl Mueller: Thank you very much, sir.

120 Q. (By Mr. Karl Mueller) Now back to these meetings of November 4 and 5, 1959, were you present at both those meetings? A. I was.

Q. Did you conduct both of them for the company? A. I did.

Q. Can you tell us right briefly why it was that we had two meetings instead of just one? A. We had two, because we couldn't get the employees and their families together at one time in our facilities at the plant.

• • • • • • • • • • •

121 Q. Now, was anything said by you at these November meetings in 1959 in respect to holidays? A. It was at that meeting that we fixed our '59 floating holiday

to be the one following Christmas. We only had two left, which was Thanksgiving and Christmas. It
122 has to be one of the two, so we fixed it to be Christmas, and announced the additional floating holiday for 1960, but did not fix it.

Q. Now, you refer to your announcement concerning the floating holiday being taken in conjunction with the Christmas holiday. Will you explain to us what you mean by floating holiday? A. Well, we have Christmas and we have Thanksgiving, and we have Labor Day, and July the 4th. Those are the only national holidays that we observe. To give additional holidays, we would have to fix a definite date. Rather than to close the plant down two different times, we call it a floating holiday, which could be added to any one of the four previous established holidays we have.

Q. Now, when was it that you granted, if I may put it that way, or at least announced that the holiday to be added in 1959 would be a floating holiday? When did you determine on the day that would be added as a holiday for 1959? A. It was anounced at one of our meetings, the first part of '59. I don't recall just which one.

Q. All right, sir. Then it was not until the November meeting, that is the 4th and 5th of November, 1959, that you determined which holiday would be used in conjunction with this floating holiday that had been fixed earlier in the year? A. Yes. It was announced. Of course, it had to be announced before July 4th, which was the first
123 holiday and we had passed two. It only left two and we had to make a decision which one of the two we would take, and because of the way this Christmas fell, we took it on the Christmas holiday, which would give the employees more time.

Q. Now, there is testimony in the record to the effect that a meeting was had, a Christmas party so-called or meeting of employees, in December of 1959. A. Yes.

Q. Is that in keeping with the facts? A. Yes.

Q. And where was that meeting held? A. At the Pioneer Palace.

Q. And that is a little building that belongs to the City located on the grounds known as Carter Square, is it not, over by the Will Rogers Coliseum? A. That is correct.

Q. The site of our Casa Manana of 1936? A. It is adjacent to the site of the Casa Manana.

Q. Yes. As a matter of fact, Pioneer Palace was built in connection with that Centennial Celebration, wasn't it? A. That is correct.

Q. Had you used that building for group meetings before where you had had employees and their families? A. Yes. We had.

Q. I see. Let me ask you, Mr. Mc, without getting
124 into the segregation-integration question as such, do we have some colored folk out at our plant? A. Yes. We do.

Q. And when we have these employee get-togethers, do the colored people come right along with white folk? A. They do.

Q. Does the fact that you use Pioneer Palace instead of some hotel ballroom have anything to do with the fact that we can have colored and white together at the Pioneer Palace and we can't at other places? A. Yes. It is the only place that we know of that we can have a combined meeting of the coloreds and the whites. We have tried several other places and were turned down.

Q. Now, let me ask you this. Let me put it this way, if I may. Tell us generally what went on there at that Christmas party. Did you have a meal? A. No.

Q. Refreshments? A. We had soft refreshments and Christmas tree, Christmas party, and all the kiddos came, and they all received presents. Also there is an exchange of names throughout the plant, and various presents are given to various employees all at this time.

Q. Have some kind of a Christmas program? A. Yes. Christmas program.

125 Q. Music and that sort of thing? A. Music, singing.

Q. Let me ask you, Mr. Mc, have you had kind of a year end bonus? A. Oh, yes.

Q. Out there at the plant? A. Yes. We do have.

Q. Did you have a bonus in December of 1959? A. Yes, and we hand the bonuses out at Christmas at this Christmas party.

Q. I see. All right, sir. Now, was any further announcement made concerning the day that would be the added

holiday in 1959 at this Christmas party? A. I don't believe there was. I don't recall making such an announcement at the party, because at that time we were making a survey as to whether it would be a floating or a possibility of offering it as a birthday. We hadn't finished our survey at that time.

Q. Now, the survey to which you refer, then, is you were surveying the birthdays of employees in connection with the holiday to be added in 1960? A. Yes.

Q. All right, sir. A. The survey which I have reference to is determining how many people in a department in any one week in any one month, how it would affect
126 the department as far as production. We had to get it segregated and analyze the situation before we could offer it as one of the choices.

Q. All right, sir. Was that survey in respect to employees' birthdays completed between the time of the Christmas party and the first of the year? A. Yes. It was.

Q. Do you know whether or not in connection with that survey the employees were set up by departments and their birthdays set opposite their name, so that you could determine the extent to which the department would be affected if employees' birthdays were made the sixth holiday in fixing this holiday that was to be added as the sixth holiday in 1960? A. Yes. It was done by the first of the year or just several days thereafter.

Q. All right, sir. A. I have forgot the exact date it was completed.

Q. Now, Mr. Mc, can you tell the Examiner whether or not the birthday holiday versus a floating holiday, to be attached to some other fixed holiday, had anything to do with your desire to avoid having to shut down the plant generally an additional day, separate and apart from other holiday shutdowns? Did that figure in your thinking at all? A. It did.

Q. In determining what the sixth holiday should
127 be specifically? That is correct.

Q. And was the purpose of the survey in respect to birthdays to see whether or not it would result in a shutdown of a department? A. That is correct.

Q. Did you have any plans in November and December of 1959 with respect to the time that you would make a definite announcement as to the particular day that would be observed as the sixth holiday in 1960? A. Yes. We did. We felt—

Q. What were those plans? A. We felt that we would have the survey completed and be able to offer the birthday as a choice of a holiday. In our meeting it was planned for January.

Q. Is it correct to state, then, that in December you did plan to have an employee get-together in January at which time you would make specific the sixth holiday? A. That is correct.

Q. Will you tell the Examiner whether or not the January meeting was held, and if not, why? A. No. It was not held. We had overlooked the fact that the Fat Stock Show interrupted us at that time, and they would not lease the Pioneer Palace during the Fat Stock Show.

Q. And the Fat Stock Show to which you refer is probably more correctly known as the Southwestern Exposition-Fat Stock Show? A. That is correct.

128 Q. And it uses the Coliseum grounds out there, which includes Pioneer Palace and the area around it; is that right? A. That is correct.

Q. And did you determine after the Christmas party that Pioneer Palace was not available to you? A. Yes.

Q. For a January meeting in 1960? A. Yes. We had called the lady to make reservations, and she gave us the information at that time.

Q. And do you recall the earliest date that Pioneer Palace was available for a meeting after the 1st of January, 1960? A. No. I don't. Mr. Meadows handled that and I don't know what the earliest date was.

Q. Do you know whether or not you sought to get the earliest date you could as soon as Pioneer Palace was available? A. Yes. That is correct, with the exception that we never have—try not to have our parties right at the first or very beginning of a month. We try not to do that. We have our first of the month closing inventory and other things, and we don't have time to do much planning at that point, and outside of the first week we would have taken the earliest date, I am sure.

Q. All right, sir. Following your Christmas party, then, in 1959 your next employee get-together of any size
129 anyway, which embraced all employees, was on February 25, 1960, at Pioneer Palace? A. That is correct.

Q. Do you recall when it was that you announced to the employees when the next employee party and get-together would be held? A. State that question again.

Q. Do you remember when it was after the first of January 1960 that you told the employees when we were going to have our next employee get-together? A. I don't recall, but it is a matter of record. We can get it.

Q. Did you issue a letter or invitation to employees to come to this party on February 25, 1960? A. Yes.

(Thereupon, the document above referred to was marked Respondent's Exhibit No. 5 for identification.)

Q. (By Mr. Karl Mueller) Mr. McDonald, I show you what appears to be a mimeographed copy letter or bulletin on a letterhead of Exchange Parts Company, marked for identification as Respondent's Exhibit 5, dated February 23rd, 1960. Is that the invitation, bulletin, or letter, to which you last referred? A. That is correct.

Q. And were copies of this instrument such as
130 Respondent's Exhibit 5, distributed to all of the employees at the plant? A. That is correct. Now, it may have been mailed to their homes. I am not sure about that.

Q. But at any rate it was given general circulation among the employees, either hand to hand or by mail? A. That's right.

Mr. Karl Mueller: We offer Respondent's Exhibit 5, please.

Mr. Parker: I have no objections.

Trial Examiner: All right. The letter may be received in evidence and marked as Respondent's Exhibit No. 5.

Mr. Karl Mueller: Thank you, sir.

(The document heretofore marked Respondent's Exhibit No. 5 for identification was received in evidence.)

Q. (By Mr. Karl Mueller) Referring to Respondent's Exhibit 5, Mr. Mc, I notice that your communication

starts out, "Confirming the February 13th announcement I made at the plant, our February EMPLOYEE DINNER will be held at 7:30 PM February 25, 1960, at Pioneer Palace, . . ."; does that refresh your recollection concerning any announcement you may have made earlier to the employees about the fact they were going to have a party out at Pioneer Palace on February 25?

131 Is my question not clear? A. No. Your question is clear. I am trying to remember. What day was the 13th? Maybe that will help me.

Q. Saturday. A. No, sir. I can't recall the exact meeting it was.

Q. But do you recall from this letter that you put out on the 23rd that on the 13th you did make some character of announcement to the employees to the effect that a meeting of the employees would be held 12 days later at Pioneer Palace on February 25th? A. I am sure I must have made the announcement, and I recalled it at the time or I wouldn't have put it in the letter.

Q. If you hadn't have held it you couldn't have confirmed it? A. No, sir.

Trial Examiner: Suppose we get to the meeting of February 25. I think it is established as to the circumstances under which it was called.

Q. (By Mr. Karl Mueller) All right. Following the Examiner's suggestion, if you will, Mr. Mc, were you present at the meeting on February 25? A. I was.

Q. Did you conduct the meeting for the company? A. No.

Q. Who conducted it? A. Mr. Meadows, Al Meadows, personnel manager.

132 Q. What, if any, determination had you made prior to that meeting with respect to the birthday holiday being the sixth holiday instead of a floater? A. We had determined that if the employees wanted it, their birthday as a holiday, we would be able to permit it.

Q. All right. What, if anything, was done then in that regard at the February 25 meeting in 1960? A. They were given a chance to decide whether they would want another floating holiday or would they like to have it on their individual birthdays.

Q. All right, sir. A. And the majority voted to have it on their birthdays, so it was set up that way.

Q. Let me ask you, Mr. Mc, whether or not the tendency of the representation proceeding had anything whatsoever to do with your determination to grant and your actually granting the sixth paid holiday?

Mr. Parker: I object to that question.

Trial Examiner: Overruled. He may answer it.

A. No. It had no bearing on it at all.

Q. (By Mr. Karl Mueller) All right, sir. A. The policy was established back in 1955, actually.

Q. Mr. Mc, did a representative of the Boilermakers Union pass out leaflets, handbills, at the plant from time to time in February of 1960? A. Yes. They did.

133 Q. Were some of those sent to you or given to you? A. Some of them were given to me. Some of them were mailed to me.

Q. Mr. Mc, I show you what appears to be a bulletin dated February 16, 1960, which I have marked for identification as Respondent's Exhibit 6. Is that a copy of one of the bulletins that was distributed out at the plant in February 1960?

(Thereupon, the document above referred to was marked Respondent's Exhibit No. 6 for identification.)

A. Yes, sir. It was.

Q. (By Mr. Karl Mueller) I show you another instrument dated February 25, 1960, which I have marked for identification as Respondent's Exhibit 7. I will ask you to state whether or not that is a copy of another bulletin that was circulated out there at the plant to the employees?

(Thereupon, the document above referred to was marked Respondent's Exhibit No. 7 for identification.)

A. Yes. It was.

Mr. Karl Mueller: We offer Respondent's Exhibits 6 and 7, please, sir.

. . . . . .

134 Trial Examiner: All right. Well, the copies of the leaflets may be received in evidence as Respondent's Exhibits 6 and 7 respectively.

(The documents heretofore marked Respondent's Exhibits Nos. 6 and 7 for identification were received in evidence.)

135 Q. (By Mr. Karl Mueller) Mr. Mc, had there been any effort on the part of management out there to keep it secret from the employees that you had under consideration offering the employees birthday in lieu of a second floater as the sixth holiday, prior to the February 25 meeting? A. No. There was no secret about it at all.

Q. Do you know whether or not there was some talk that such was under consideration? A. Oh, yes. There was talk amongst the foremen and supervisors and personnel department, which I am sure it gets around. It would come around the plant.

Q. Was that early in January of 1960? A. That is correct.

Q. Mr. Mc, do you recall approximately when it was that the company established their policy in respect to paid vacations? A. I believe that the paid vacation was established back in 1953.

Q. All right. Let's come to 1959, if you will. Were we working an extended work week in 1959? By that I mean a regular work week in excess of 40 hours? A. Yes.

Q. What was it, 49? A. Forty-nine and a half hours.

136 Q. Were we working an extended work week in 1958, do you recall? A. The extended work week in '58 wasn't as prevalent as it was in '59.

Q. All right, sir. Now, in 1959 did you pay on a weekly basis, pay employees for their work on a weekly basis? I mean pay every week? A. Oh, yes, sir. Paid every week.

Q. All right, sir. And was Friday payday out there in 1959? A. That is correct.

Q. Have you continued to pay employees on a weekly basis, that is, pay them every Friday? A. That is correct.

Q. I believe you have already testified that prior to January 1, 1960, your work week for payroll purposes ended on Thursday? A. That is correct.

Q. So that the employees were paid on the following Friday for the seven-day period just ended? A. That is correct.

Q. Which embraced Friday and a half day Saturday of the preceding calendar week? A. That is correct.

Q. I believe you have also testified, have you not, that in February 1960 we changed our work week for payroll purposes? A. That is correct.

Q. So as to end on Wednesday instead of on
137 Thursday? A. That is correct.

Q. And will you tell us right briefly why that change was made? A. Because of the increased number of employees. It was throwing too much burden on the accounting department to get the payroll checks ready just in two-thirds of a day. We had to give them more time.

Q. Up to that time payroll had to wait until the time records were completed as of Thursday and then the very next day make the computations and issue the checks to the employees on Friday? A. That is correct.

Q. So by changing the work week for payroll purposes to end on Wednesday it gave the payroll department the next Thursday in which to work the payroll and make the checks for delivery on Friday? A. That is correct.

Q. Do you recall, Mr. Mc, that in connection with this change in the work week for payroll purposes that you issued a bulletin to employees? A. Yes. We issued a bulletin to the employees and told them how we would set up the pay period and how we would figure the overtime and so forth, that it would be commensurate with the previous pay periods.

Q. I show you an instrument marked for identifica-
138 tion as Respondent's Exhibit 8, denominated "Bulletin" and dated January 5, 1960, and I will ask you to state whether or not that is a copy of the bulletin to which you last referred?

(Thereupon, the document above referred to was marked Respondent's Exhibit No. 8 for identification.)

A. That is correct.

Mr. Karl Mueller: We offer in evidence Respondent's Exhibit 8, please, sir.

Mr. Parker: I have no objections.

Trial Examiner: The bulletin may be received in evidence and marked as Respondent's Exhibit 8.

(The document heretofore marked Respondent's Exhibit No. 8 for identification was received in evidence.)

Q. (By Mr. Karl Mueller) Now, up until January 1, 1960, Mr. Mc, and at least during the year 1959 had you been using your payroll work week as the vacation week in scheduling vacations under your vacation policy? A. That is correct.

Q. And was the vacation week equal in length to the regular work week during 1959? A. It was.

Q. And that is to say that when a man got one
139 week's vacation, he got 49½ hours? A. That is correct.

Q. And your work week was 49½ hours? A. That is correct.

Q. So prior to January 1, 1960, and at least during 1959, if a fellow had one week of vacation he would start on that vacation he would start on that vacation on Friday? A. That is correct.

Q. And take off Friday and a half day Saturday and would then complete his vacation the following Thursday and report to work the following Friday? A. That is correct.

Q. All right. When you determined to change the work week for payroll purposes the first of January 1960, did you make any determination in respect to the scheduling of vacations? A. Yes. We did.

Q. What was it? A. Well, we decided when we were making the change in our payroll period we would change our vacations to start on a calendar week. Make both changes at the same time.

Q. So that an employee would not start on his vacation on Thursday and wind up the following Wednesday, but would instead start on Monday and come back to work the following Monday, assuming he had one week of vacation in either case? A. That is correct.

Q. Was any change whatsoever made in the
140 amount of the vacation allowance? A. None whatsoever.

Q. They continued to get 49½ hours vacation in 1960, as they had in 1959? A. That is correct.

Q. No more; no less? A. That's right.

Q. Have employees been off work taking vacations any longer since the scheduling has been changed in 1960 than they were in 1959? A. No.

Q. And was the determination to change the scheduling of vacations made at the same time you determined to change your work week for payroll purposes? A. It was.

Q. About the first of January 1960? A. That is correct.

Q. Now, normally do employees take vacations during the month of January? A. No.

Q. Do you permit employees under your vacation policy, Mr. McDonald, to express a preference with respect to the time they would like to have their vacation? A. Yes. We do.

Q. And do you respect those preferences as nearly
141 as you can, consistent with your plant requirements? A. That is correct.

Q. Now, do you know whether or not any employees went on vacation under this new scheduling prior to February 19, 1960? A. Yes.

Q. Did they? A. Yes.

Q. Now, in connection with preparation for this hearing, did we ask you to please get for us the name of any individual who actually began his vacation in 1960, prior to February 19 of this year under the new scheduling following the change in the work week for payroll purposes? A. You did.

Q. And did you determine that Winfred, W-i-n-f-r-e-d, H-a-l-l, Hall, went on vacation under this so-called new scheduling prior to February 19th of this year? A. We did.

(Thereupon, the documents above referred to were marked Respondent's Exhibits Nos. 9 and 10 for identification.)

Q. (By Mr. Karl Mueller) Mr. Mc, I show you what purports to be two time cards, one dated February 17, 1960, marked for identification as Respondent's Exhibit 9, and one dated February 24, 1960, identified as Respond-

ent's Exhibit 10, and I will ask you to state whether
142 or not those are the clock cards of Winfred Hall.
A. Yes. They are.

Q. Does the clock card record, and the one identified as Respondent's Exhibit 9, begin with work on February 11? A. Yes. It does.

Q. 1960? A. Uh-huh.

Q. And the last work shown is four and a half hours on February 13, which was a Saturday? A. That is correct.

Q. And then does the card marked for identification as Respondent's Exhibit 10 next follow in time sequence and indicate a return to work on February 22, 1960? A. That is correct.

Q. And the intervening time between February 13 and February 22— A. No. Began work on the 17th.

Q. No. It is 7:00 o'clock, isn't it? A. That's right.

Q. It's February 22? A. Yes.

Q. Washington's Birthday and a Monday? A. Yes.

Mr. Karl Mueller: We offer in evidence Respondent Exhibits 9 and 10, please.

143 Mr. Parker: I have no objection. I wonder if you could identify Winfred Hall?

Trial Examiner: You want him to identify Winfred Hall?

Mr. Parker: I would like for him to identify Winfred Hall. Is he an employee, supervisor, or what?

The Witness: He is an employee.

Trial Examiner: The exhibits may be received in evidence and marked Respondent's Exhibits 9 and 10.

(The documents heretofore marked Respondent's Exhibits Nos. 9 and 10 for identification were received in evidence.)

Q. (By Mr. Karl Mueller) You have indicated that Winfred Hall is a employee, rank and file, as it were, with no disrespect? A. That is correct.

Q. Now, Mr. Mc, I think you have already indicated, but to be sure we don't overlook it, let me ask you. The plant is shut down normally Saturday afternoon, is it not? A. That's right.

Q. Our regular work week, I mean in terms of shutdown for a weekend, ends on Saturday noon? A. That is correct.

Q. And we start up again on Monday morning; is that right? A. That's right.

Q. So that the last half of February 13, 1960, for
144 Winfred Hall, would have been his normal time of rest? A. Yes.

Q. Saturday afternoon? A. That's right.

Q. And the 14th, a Sunday, would have been his normal day of rest? A. That is correct.

Q. Wasn't scheduled to work on Sunday, right? A. That's right.

Q. I think you have, have you not, Mr. McDonald, identified the period of time during which no work is shown on his clock cards, Respondent's 9 and 10, aside from the Saturday afternoon and Sunday, as a vacation period for Winfred Hall; is that correct? A. That is correct.

Q. I show you an instrument that I have marked for identification as Respondent's Exhibit 11. I will ask you to state whether or not that this is in effect a voucher or a duplicate original of the vacation check that was given to Winfred Hall for this period of time that he was off as indicated on his clock cards, Respondent's 9 and 10?

(Thereupon, the document above referred to was marked Respondent's Exhibit No. 11 for identification.)

A. That's right. This is a vacation check.

145 Q. (By Mr. Karl Mueller) All right. This is a duplicate original that is kept in the company files? A. That is correct.

Q. And was made at the time that the check itself, or voucher check was made? A. That's right.

Mr. Karl Mueller: We offer Respondent's Exhibit 11.

Mr. Parker: No objection.

Mr. Scott: No objection.

Trial Examiner: All right. The voucher may be received in evidence as Respondent's Exhibit 11.

(The document heretofore marked Respondent's Exhibit No. 11 for identification was received in evidence.)

* * * * * * * * * * * *

146 Q. (By Mr. Karl Mueller) Mr. McDonald, I will ask you to state whether or not the pendency of the

representation case to which reference has been made had anything to do with your determination to change your work week for payroll purposes? A. No. It didn't.

Q. Or with the actual changing of that work week? A. No.

Q. I will ask you the same question with respect to the changing of the scheduling of vacations from the work week to the calendar week. A. No.

• • • • • • • • • •

Q. (By Mr. Karl Mueller) Mr. Mc, in the course of your examination by Mr. Parker you were asked some questions concerning the determination by you as a matter of
147 policy for the company that paid holiday time would be treated as time worked for the purposes of computing weekly overtime. Did you make that change in policy yourself? A. Yes.

Q. And did you establish the policy of treating paid for holiday time as time worked? A. (Nods head affirmatively.)

Q. I believe you testified, have you not, that you did that some time prior to July 4, 1959? A. That is correct.

Q. And that new policy was announced prior to July 4, 1959, by bulletin in connection with the July 4 holiday which followed? A. That is correct.

• • • • • • • • • •

Q. Now, you testified, did you not, due to error in the accounting department this policy was not carried out with respect to the holiday on Labor Day or Thanksgiving or Christmas Day in 1959? A. That is correct.

Q. In that connection, you testified that it was when we were preparing for the hearing, or a hearing, that
148 you first became aware of the fact that there had been a slipup in the accounting department, and that your policy had not been carried forward; is that correct? A. That is correct.

Q. What hearing are you talking about, this one or the one that was held in the representation case in December of 1959? A. There was one held in December.

Q. 1959? A. 1959. December 29th, I believe it was.

Q. Was that at a time there in your office after Christmas and before the hearing when we were going over the

matters that we expected to cover in our examination of you in the representation hearing before the Board Hearing Officer? A. That is correct.

Q. And was it in the course of that conference that we were having there at that time that you first were aware of the fact that your change in policy had been given effect on July 4, 1959, but had not been with respect to the following holidays, or the succeeding holidays in 1959? A. It was at that time that it was brought to light that it had not been done.

Q. Is that the first time you knew it? A. Yes. It was.

Q. All right. Was any determination made there at that time in the course of that conference as to the
149 position the company the company was in, and the position it should take in respect to future holidays?

A. It was.

Q. What was that? A. It was that we would just start in on our next holiday and just let the ones that we had not paid, because there was a number of employees that had already left our company that we had not paid. There would have been a matter of confusion, changing of records, and so forth, so we decided to just let it go and start on our next holiday.

Q. Did you seek legal advice with respect to that, whether it was good or bad? A. I did. We asked you.

Q. And what advice did you get from the able lawyer that you consulted with? A. You advised us to just forget the wrongs that had already happened, and start off correct, as it had been intended.

• • • • • • • • • •

150 Cross Examination

Q. (By Mr. Parker) Mr. McDonald, you have testified that your policy was established in regards to the
151 holiday back in 1955; is that not correct? A. That is correct.

Q. And as I understand it, your policy is as you announced at a Christmas party in '55 that a holiday would be given each year until such time as the employees were notified differently? A. That is correct.

Q. You also testified that we have not notified employees that we are not granting another one? A. That's right.

Q. You haven't told them that you intend to grant another one, have you? A. No.

Q. Another holiday? A. (Nods head negatively.)

Q. When do you normally make up your mind as to whether or not you are going to grant a holiday the following year? A. It is usually the latter part of the year, preceding—or around the first part of the year that the holiday is granted then.

Q. In other words, if any holiday is given in 1961 the decision would be made the latter part of 1960 or the first of 1961? A. That is correct, sir.

Q. Has that been the past practice? A. That's right.

152 Q. Was that the practice in 1959 in regards to the floating holiday? When was it decided to give them a holiday in 1959? A. To give the '59 floating holiday?

Q. Yes. A. It was I believe in January 1959, if I am not mistaken.

Q. That was in January of '59? A. Uh-huh.

Q. And you made the announcement that would be the day after Christmas? Did you make that announcement? A. That was made in the meeting on November 4th and 5th, that it would be the day after Christmas.

Q. Now, these meetings you had with the employees and family, what did you say was the reason for these meetings on November 4th and 5th? A. Well, it was a meeting. I don't think I went into the reason, the particular reason why we called the meeting, but it was a meeting that just followed our convention in New Orleans at which we had been in several employee relation sessions, and some of the ideas had been brought up, and we called the group together on that particular case to inaugurate some of these ideas.

Q. When did the company decide that they would give a holiday in 1960? A. Well, that was announced in November.

153 Q. When was the decision made? A. In November.

Q. And when was your survey started? A. The survey was started in December.

Q. In other words, up until November you didn't know whether or not you were going to get a holiday in 1960? A. 1960, that is correct. We are talking about November '59 as far as '60 was concerned?

Q. Yes, sir. A. That's right.

Q. And you made the decision in November? A. We made the decision in November and announced that there would be another holiday, not announcing what it would be.

Q. Were you considering the birthday at that time? A. Yes. We were. That was one of the ideas that had been brought out in our employee relations sessions in New Orleans.

Q. You did not announce the possibilities of a birthday? A. We didn't announce it then, because we first wanted to make an analysis.

Q. When would you say was the first time you remember or knew of union activity, Mr. McDonald? A. It's the date that Mr. Bishop received the letter from the union organizer, Mr. Tison.

Q. Had any of your supervisors informed you that the union had been passing out leaflets on about October
154 26 and thereafter? A. No. I think we were away at the convention at that time.

Q. When were you at the convention? A. It was the 26th through the 30th. In fact, I think we probably left—I am not sure. I would have to check it, check the records. I imagine we must have left to go on about the 24th.

Q. And when did you return from the convention? A. We didn't get back into Fort Worth until Sunday night.

Q. What date is that? A. Yes. It was Sunday night.

Q. Was that in November? A. No. That would have been November—let's see—October the 31st was Sunday. I believe that was Sunday when we came back. I believe that was Sunday we came back in Sunday night, to Fort Worth, and went straight to a football game. Came into Carter Field and went to a football game and then returned after the game late Sunday night sometime.

Q. So you returned to Fort Worth either October 30th or November 1st, then? A. Yes.

Q. And you went to the plant on Monday morning, did you not? A. Yes. That's right.

Q. Did any of the supervisors report to you that these leaflets had been passed out on Monday? A. No.

155 Q. Have they reported to you since you were informed by letter that leaflets were passed out? A. Well, usually they were mailed to me by Mr. Tison.

Q. Have you learned since that leaflets were passed out to the employees, prior to the receipt of the letter that Mr. Bishop received? A. I have learned that they were handed to them as they left the plant. In fact, we saw them.

Q. Was this before the letter was received or afterwards? A. Oh, this is after.

. . . . . .

Q. When past holidays were given, were employees

156 allowed to vote as to what holiday they desired? A. No. This was the first time this came up.

Q. I believe this testimony straightened it out, as a result of your testifying about the vacation policy, but I just want to make sure.

As I understand you testified that the change in vacation policy did not give the employees any more time as regarded their work time; is that correct? A. That is correct.

Q. But it did give them more time off as regards to their own time? A. That is correct.

Q. That was a result of another weekend coming in? A. That is correct, sir.

Q. Now, you have testified that employees have taken vacations prior to February 19th, under this new schedule, and there was one Winfred Hall having done so. Were there any others? A. I—

Q. Was Mr. Hall the only employee that took it under this new policy? A. He was the first one.

Q. He was the first one? A. Yes.

Q. Is he the only one before February 19 that

157 took it under the new policy? A. I believe that is correct.

Q. Actually what happened was when he put in for his schedule he was then told that he could take it according to your new policy? A. That is correct.

. . . . . .

General Counsel's Exhibit 2

158 BEFORE THE NATIONAL LABOR RELATIONS BOARD

EXCHANGE PARTS CO.

Dependable Automotive Exchange Units

Phone EDison 6-4075

2500 West Vickery Boulevard

P. O. Box 1866 Fort Worth 1, Texas

March 4, 1960

To Our Fellow Employees:

You got an envelope from us through the mail yesterday—*AN EMPTY ENVELOPE!* You may have thought that we "goofed"—*that we forgot to put something in it!* But we didn't forget—we didn't intend to put anything in it!

That *Empty Envelope* had everything in it that the Boilermakers have done for you and everything it can do for you! That *Empty Envelope* brought home to you the *Empty Promises* of the Union and the *fact* that *it is the Company that puts things in you envelope*—your pay check, your vacation pay, you holiday pay, your insurance, etc. The Union can't put any of those things in your envelope—*only the Company can do that.*

Those of you who have been with us for sometime know the improvements that have been made in your job—the benefits you now enjoy as employees that make your job a good job—the fact that it didn't take a Union to get any of those things and that it won't take a Union to get additional improvements in the future.

We enclose an outline of some of the things that the Company puts in your envelope. This is for the benefit of newer employees who may not have thought about them. It is also for the benefit of older employees who may have forgotten about them. We are sure you will agree that all of us should think about them—when we do, we realize

it's the Company not the Union, *that puts the pay in your envelope!* When you know that, we are sure you will

VOTE NO! GROW WITH EPCO

Sincerely,

C. V. McDONALD
C. V. McDonald
R. S. BISHOP
R. S. Bishop

The First With the Most in Quality and Service

---

159 FACTS YOU SHOULD KNOW ABOUT *YOUR* BENEFITS AT EPCO

"Brother" Tison *would have you believe* that all the things that EPCO does for you are done for one purpose —to buy your vote at the Labor Board election March 18th. He *would have you believe* that before his boilermakers, iron shipbuilders, blacksmiths and forgers union started trying to organize this *automotive parts rebuilding plant you folks did not have any benefits!* He *would have you believe* that before he arrived your Company cared nothing for you.

Now we doubt if you are very much interested in ancient history, but the story of benefits furnished by your Company starts way back in 1938 when this Company was founded, *some 21 years before we ever heard of "Brother" Tison.* Your Company started THEN doing good things for employees—things which it did not HAVE to do—and, in general, isn't that a pretty good description of benefits as we think of them today? Back in those early days the Company couldn't and didn't, do too many things for employees—it was a new Company, operating on a shoestring, providing jobs for all the employees possible. True, there probably weren't more than 10 employees at the beginning, but your present Company, providing jobs for *hundreds* of people, has grown from the modest beginning.

We will skip hurriedly through those first years in order to get up to the 1950's which is when your Company began

to grow so rapidly; but during the years from 1938 to 1949 you had *some* benefits, such as 40 hours paid vacation and paid coffee breaks—that was about "it" except for those required by law, such as Social Security (then 1%), unemployment insurance and workmens' compensation insurance. NO paid holidays—NO Christmas bonuses, although at various times employees were given gifts ranging from assorted jellies to baskets loaded with hams, turkeys and groceries, depending on the Company's financial situation at Christmas time. NO life insurance—NO hospitalization insurance—NO lunchroom facilities—NO bowling leagues—NO free medical examinations—NO flu shots—NO free parking—NO employee telephones—NO special facilities such as bringing poll tax and car license deputies to the plant for employee convenience.

So that you may know the FACTS regarding your benefits at EPCO, the following will show you, year by year, how your Company has continuously added MORE benefits. You will then realize, if you don't already, that "Brother" Tison is talking from the wrong side of his face when he tells you "*now* you have become an individual with a certain prestige". YOU know and WE know that each of you has ALWAYS been regarded and treated by your Company as individuals with MUCH prestige.

1949 Benefits:

1. Paid Vacation 40 Hours (Straight Time)
2. Coffee Breaks 2 Per Day
3. Purchase Discounts
4. Emergency Company Loans
5. Free Parking (In 1949—not previously)
6. Social Security (1½%)
7. Workmens' Compensation Insurance
8. Unemployment Insurance

In *1950* the following benefits were added or increased:

More liberal vacation pay—increased from 40 hours (Straight Time) to 45 hours (40 hours straight time and 5 hours overtime).

Christmas—the Company gave a $10.00 bill to each employee

In *1951* the following benefits were added or increased:
Christmas bonus—instead of the $10.00 bill the Company was able to give each employee a Christmas basket full of groceries plus a ham or turkey.

In *1952* the Company was unable to provide additional benefits to those given in 1951, and no changes were made

In *1953* the following benefits were added or increased:
Christmas bonus—increased and paid in cash

160

In *1954* the following benefits were added or increased:
Larger Christmas bonus
Social Security upped to 2%.
Company began putting all receipts from vending machines into separate fund for employee parties, flowers, etc.

In *1955* the following benefits were added or increased:
Gave our FIRST paid holiday (Christmas)
Christmas bonus increased
Paid 2% Social Security on first $4,200.00 of employee earnings rather than of first $3,600.00
Installed one telephone for employee use

In *1956* the following benefits were added or increased:
Added SECOND paid holiday (Thanksgiving)
Larger Christmas bonus
Free Life Insurance
Free hospital insurance after 1 year (Company paid ½ the first year)
Hospital insurance made available for employees dependents at group cost (lower than an individual policy would have been)
Free medical examinations
Poll Taxes and car tags sold at plant on Company time
Laundry service (uniforms) made available to employees
Company personnel office opened

In *1957* the following benefits were added or increased:
Added THIRD paid holiday (Labor Day)
Larger Christmas bonuses

Social Security upped to 2¼%
EPCO ECHO Company paper first published
Improved and better group insurance program installed
Company started indorsing employee loans at bank
Company paid for flu shots, given at plant on Company time

In *1958* the following benefits were added or increased:
Added the FOURTH paid holiday (July 4th)
Company personnel office began giving more personal services (income tax help, etc.)
Larger Christmas bonuses
Company added second employee telephone
Employee lunchroom set up

In *1959* the following benefits were added or increased:
Added the FIFTH paid holiday (Extra day at Christmas)
Liberalized vacation pay—employee with 2 or more years service provided with 49½ hours vacation pay (40 hours straight time and 9½ hours overtime)
Larger Christmas bonuses
Social Security upped to 2½%
Survey made on educational interests of employees—plans started for providing means of additional schooling at Company expense
John Hancock group insurance program installed, providing Major Medical Expense coverage and other features not included in old program
Company started paying ⅔ employee Major Medical coverage premium for the first year, continuing to pay all of life insurance premium and all of Major Medical premium after 1 year
Bowling league started for employees and wives or husbands—league had been planned for some time and EPCO league was the first to get going at the new Forest Park Lanes on its completion in November 1959

161

In *1960* the following benefits have been added or increased (thus far):

Added a SIXTH paid holiday (your birthday)
No loss of overtime pay during the week a paid holiday

is given. This will mean $5.00 to $6.00 more per employee per holiday
Social Security upped to 3%
Vacation time extended 1½ days
Better discount on merchandise purchased
More recreational activities

Thus, bringing all these existing and increased benefits together in one group, you now, as an employee of this Company, enjoy all the following listed benefits:

Description	Annual Cost To Company	This Equals This Amount Per Year To You
Six Paid Holidays	$ 24,882.00	$ 82.94
3% Social Security	32,445.00	108.15
Better Discounts on Merchandise Purchased	1,023.88	3.41
Bowling League	12,000.00	40.00
Free Life Insurance	6,732.00	22.44
Free Major Medical Ins. (after 1 year)	13,752.00	45.84
Generous Christmas bonus (based on 1958)	37,842.00	126.14
Vacation Pay	22,809.00	76.03
Employee Lunchroom	1,800.00	6.00
Employee Telephones	360.00	1.20
Free Flu Shots	900.00	3.00
Company Paper (EPCO ECHO)	1,200.00	4.00
Poll Taxes and Car Tags sold at plant on Company time	462.00	1.54
Vending Machine Receipts	3,300.00	11.00
Unemployment Insurance	4,500.00	15.00
Workmen's Compensation Insurance	18,648.00	62.16
Paid Coffee Breaks	63,225.00	210.75
Free Parking (Rent on Additional Lot)	875.00	2.92
Total (Based on averages, 1 year service or more)	$246,755.88	$822.52

These benefits amount to *42 cents* per hour over and above *your regular pay*—and have increased approximately 20 percent in the past year alone. Not included in these figures are such things as new rest rooms, cleaner, more comfortable working conditions, the educational plans in the making, numerous personal services, company and bank loans, cost of handling employee uniforms, free medical examinations, new and improved tools and equipment and all the other things done to make your job easier and more pleasant.

As shown on the schedule above, your Company is now spending approximately *a quarter million dollars* a year on benefits for YOU—as you also see, practically ALL OF THIS HAS BEEN PUT INTO EFFECT BEFORE "BROTHER" TISON EVER CAME AROUND.

VOTE NO——GROW WITH EPCO!

[162]

When ALL THE SHOUTING IS DONE .. REMEMBER

IT'S THE COMPANY THAT HAS THE JOBS AND PAYS THE MONEY — NOT THE UNION

Respondent's Exhibit 1

164 BEFORE THE NATIONAL LABOR RELATIONS BOARD

BULLETIN

THE ENTIRE PLANT AND WAREHOUSE WILL BE CLOSED SATURDAY, JULY 4TH, IN OBSERVANCE OF INDEPENDENCE DAY

In accordance with Company policy, employees will be paid 4½ hours for this holiday, regular time or overtime, in accordance with hours worked, but in order to qualify for holiday pay you must be present all day Friday and Monday before and after the holiday.

C. V. McDONALD
Vice President & General Manager

Respondent's Exhibit 2

165 BEFORE THE NATIONAL LABOR RELATIONS BOARD

INTERNATIONAL BROTHERHOOD OF
BOILERMAKERS, IRON SHIP BUILDERS, BLACKSMITHS,
FORGERS & HELPERS

Brotherhood Building Kansas City 4, Kansas

Birkley Hotel, Rm. 604
200 Burnet Street
Fort Worth, Texas
November 9, 1959

Exchange Parts Company
2500 West Vickery
Fort Worth, Texas
Attention: Mr. Bishop, President

Dear Mr. Bishop:

This letter is to inform you that the Boilermarkers International Union, AFL-CIO, is engaged in organizational work in your plant, and a majority of your employees have designated our organization to represent them in

contract negotiations. Realizing that as President of your Company, you are a busy man. I am therefore taking this opportunity to request a meeting with you at your earliest convenience to discuss the terms of a contract with your Company.

I have informed our members in your plant their rights under the Law and I realize you are familiar with the Law; however, in the spirit of goodwill allow me to quote the Law:

"Section 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. . . .

Section 8. (a) It shall be an unfair labor practice for an employer—

1. To interfere with, restrain, or coerce employees in the exercise of the right guaranteed in Section 7;

3. By discrimination, in regards to hiring or firing, to encourage or discourage or interfere with membership in any labor organization."

166 Now, Mr. Bishop, the Boilermakers International Union at all times have maintained a friendly relationship with the employers we do business with, and that is the reason for this letter. We wish to start with your company under the same relationship we have with thousands of employers we are doing business with. I expect no reprisals from the management against any members and I know that you, as a good American, will see that our business is conducted in decency and fair play.

I am sending a copy of this letter to the Regional Director of the NLRB to keep them posted of our relationship until a contract is consummated.

Looking forward to an early meeting at your convenience and with kind personal regard, I am

Sincerely,

THERON H. TISON
Special Representative
Boilermakers Intl. Union

cc: Dr. Edwin A. Elliott, Reg. Dir.
N.L.R.B.
300 West Vickery
Fort Worth, Texas

cc: Mr. A. J. Eberhardy, V. P.
Boilermakers Intl. Union

Registered: Return Receipt Requested
oeiu #277

Respondent's Exhibit 3

167 BEFORE THE NATIONAL LABOR RELATIONS BOARD

EXCHANGE PARTS CO.

Dependable Automotive Exhange Units

Phone EDison 6-4075

2500 West Vickery Boulevard

P. O. Box 1866 Fort Worth 1, Texas

November 4, 1959

Mr. and Mrs. Employee

We have just returned from the National Rebuilders Convention. This Convention this year was the best and one of the most informative Conventions we have attended. We came back with many new ideas that will help our employees, our Company and the Rebuilding Industry.

At the Convention a great deal of emphasis was placed on *employee welfare,* realizing that most of the credit for the continued growth of the Rebuilding Industry must be given to our employees and co-workers.

Thanks to you, your own Company has kept apace with our fast growing industry. Exchange Parts Company has also contributed to this growth.

Since the organization of Exchange Parts Company in 1946, no stockholder has ever received a cash dividend. Earnings have been distributed to employees in the form of bonuses and various benefits and a portion reinvested in the company to furnish capital for hiring more and more employees and to buy machinery to produce better quality merchandise at a cost that will permit us to remain competitive with our competition.

We have several times as many employees now as we had several years ago, and we hope that next year we will be able to provide many more jobs. More jobs mean more promotions. I think you will agree that Exchange Parts Company provides many more benefits for you now than in the past. We have constantly sought to provide things to make our plant a safer, more attractive, a more comfortable and better place to work. We have provided a wonderful insurance program for your protection and your families' protection—more paid vacations for your enjoyment, more paid holidays each year, lunchroom facilities, free medical examinations, free Flu shots, coffee breaks and a constantly increasing X'Mas bonus. One of the most important is provding you with steady work such as is not common in many industries.

We do all these things because we are interested in you as a person and because through your loyalty and hard work you have made it possible.

168 *YET*, we are not satisfied, we want to do more. You can help us to do more for you and your family.

1. We need first to know what you want, how you feel about certain things. What else can the company do for you.

In order to get these answers we have employed Shepherd Associates Personnel Consultants. Dr. Shepherd has been working with us for several years on training programs and personnel problems.

The questionnaire attached should be answered truthfully. *We want to know how you feel* so something can be done about it. The results of the answers to these questions will be studied. You will select a person from your Department to meet with Dr. Shepherd, Mr. Bishop and me next Saturday afternoon to go over the results and help correct some of your problems.

2. For the past six months we have been working on a *wage incentive* program. We also want to discuss this with the person selected from your Department. This is a program that can mean *much* to you and to your family.

It is only through good team work and loyalty that each can better himself. We need you and you need us. Let's get in the harness, let your wants be known so that we may work together to achieve the goal we all hope to reach—Happiness and Security for ourselves and our loved ones. Are you with us?

C. V. McDONALD
C. V. McDonald
Vice President and General Manager

The First With the Most in Quality and Service

Respondent's Exhibit 4

169 BEFORE THE NATIONAL LABOR RELATIONS BOARD

EXCHANGE PARTS CO.

Dependable Automotive Exhange Units

Phone EDison 6-4075

2500 West Vickery Boulevard

P. O. Box 1866 Fort Worth 1, Texas

November 4, 1959

AN IMPORTANT INVITATION TO EACH EMPLOYEE

(And your wife-or husband)

We have just returned from the annual Automotive Parts Rebuilders Convention, and we have some informa-

tion of vital importance to you, your family, your Company and the rebuilding industry. So that we may discuss this information with you and your wife (or husband), we invite you to attend a Bar-B-Que dinner in the plant lunchroom area. We would have liked to ask the children too but you who were at last year's Christmas Party will remember that it takes more space than we have available for these meetings. We urge that both you and your wife (or husband) attend but if for some reason they cannot, please attend yourself. As mentioned above, space is limited and so two meetings have been arranged as follows:

Wednesday, November 4th 7:30 PM for the following departments

Clutch Plates	Carburetors	Generators
Starters	Boxing	Shipping
Production Planning	Quality Control	Purchasing
Distribution	Overhead (Night Watchmen and Janitors)	

Thursday, November 5th 7:30 PM for the following departments

Brake Shoes	Clutch Assembly	Clutch Grinding
Fuel Pumps	Generator Armatures	Starter Armatures
Water Pumps	Machine Shop	Maintenance
Cleaning	Receiving	Core Control
Salvage		

Please excuse us for not giving more notice on these meetings, but we sincerly feel that this information which we want to discuss with you is of such importance that it should not wait. If, for any reason you cannot attend the meeting on the night specified above for your department, please feel free to attend the other. Of course, there is nothing compulsory about this invitation; your attendance is entirely on a voluntary basis.

C. V. McDonald
C. V. McDonald
Vice President & General Manager

The First With the Most in Quality and Service

Respondent's Exhibit 5

170 BEFORE THE NATIONAL LABOR RELATIONS BOARD

EXCHANGE PARTS CO.

Dependable Automotive Exhange Units

Phone EDison 6-4075

2500 West Vickery Boulevard

P. O. Box 1866 Fort Worth 1, Texas

February 23, 1960

THIS IS YOUR INVITATION—

To Our Monthly EMPLOYEE DINNER

Confirming the February 13th announcement I made at the plant, our February EMPLOYEE DINNER will be held at 7:30 PM February 25, 1960 at Pioneer Palace, located on the Will Rogers Coliseum grounds. You will remember it as the site of our annual Employee Christmas Party.

An enjoyable program has been planned and we sincerely hope that you (and your wife or husband) will be there.

Due to a conflict in dates with the Southwestern Exposition and Fat Stock Show we had to cancel plans for the January meeting, since we felt everyone would enjoy the dinner more if all employees could be together at one time, and Pioneer Palace was the only place big enough.

I sincerely hope that you will make every effort to attend. As at our previous dinner, attendance is entirely voluntary. If for any reason your wife (or husband) cannot attend, please try to attend yourself.

C. V. McDONALD
C. V. McDonald
Vice President & General Manager

The First With the Most in Quality and Service

Respondent's Exhibit 6

Hotel Birkley, Fort Worth, Texas
February 16, 1960

GREETINGS TO THE EMPLOYEES OF EXCHANGE PARTS COMPANY

On February 13 you the employees of Exchange Parts, were the captive audience for remarks made by Mr. W. T. Harrison, President of the anti-labor forces' "Right To Work Bill". Why didn't Mr. McDonald tell you, the employees, that the man who addressed you was the president of the Right To Work Force out of Washington, rather than imply that here was a union man who would give you the other side of the question. . . . I'll tell you why, because Mr. McDonald has not been honest with you, and to hear the other side of the issues in front of a captive audience would be the biggest landslide yet against a company who is trying so desperately to make you believe that unions are racketeers, big bosses, who smoke cigars, drive cadillacs, etc. The Exchange Parts Company is scared and they have a right to be because you, the employees, shall very soon exercise your rights at the voting booth where you vote by secret ballot and there you have nothing in front of you but a ballot, God and your conscience . . . Yes, you can ask yourself this question: Do I have job security? ? ? Should I receive more wages than I'm receiving? ? ? Do I get 7 Paid Holidays? Do I get the vacation I am entitled to for the years of services? ? ? Is the Company paying my insurance for me and my family? ? ? Do I have a shop steward to go to when I have a grievance? ? ? Do I have anything in writing that promises me "That only the company is capable of keeping its promises ? ? ? The answer is definitely NO.

Now, Brothers and Sisters, do you see why they are sponsoring Bowling Leagues? ? ? No, do you see why they are clutching at straws to buy your vote? ? ? I'll make another prediction and wait and see if it isn't true; the surprise package that you will receive at the Pioneer Palace will be in the form of possibly two more paid holidays . . . I further predict in their last minute panic of desperation,

they will offer you twenty five cents per hour increase in wages . . . Now, let's analyze these showings of the Company . . . Before the Union came in the picture; you were just a group of people who the company could *hire or fire at random*, but since the union has been in the picture you have all of a sudden become *human beings* with *rights and certain privileges* . . . WHY? WHY? I'll tell you why, because they know that as soon as the Boilermakers wins this election, and it looks as if it is going to be a landslide, then they realize that you are going to be afforded rights and privileges . . . That you are one of the union members of 16½ million organized men and women and they can no longer push you around, fire you without cause, because you have a legal and binding contract that gives you recourse . . . Yes, Mr. McDonald, it is much later than you think . . . Too late for fancy promises as my members want it in writing . . .

I further hear that the phoney card carrier told you there were racketeers in the labor unions . . . Yes, the American Federation of Labor and Congress of Industrial Organizations had some racketeers in their midst, but what did they do about it. They ridded themselves of racketeers and set up a code of ethics that a crook or racketeer couldn't hold office or in any manner be a part of the AFL-CIO. But let's go a bit further into this . . . Did this phoney card carrier, who didn't have the guts to tell you what union he belonged to, did he tell you that we have dishonest business men? ? ? Did he tell you we have dishonest attorneys? ? ? Did he tell you we have dishonest doctors or clergymen who don't follow the true concepts of God? ? ? Indeed he did not. Nor does this mean that 16½ million men and women who are organized into bona fide unions are crooks . . . That all businessmen are crooked, all attorneys and doctors are racketeers, and that all of the ministers of the church don't follow the teaching of the Bible. The answer is definitely NO! ! Most emphatically NO! ! They are decent law abiding people who believe in honesty, decency, and dignity for all regardless of race, color or creed.

Now, Mr. McDonald, I am going to give you a sporting man's chance to vindicate yourself from the mess you are in . . . The Boilermakers organization will pay for the

rental of the Pioneer Palace the 25th of February, 1960, and let's you and I debate the issues in a fair and decent manner. We will pay for the rental; you pay for the barbecue and save the rent money for wages that you are going to need to pay the employees when we win this election, which looks like a landslide . . . Soon . . . I'm sure the employees see the money that you have spent in attorney's fees, bowling leagues, parties, etc. in an effort to change their vote, but they realize that if you can do all of these things now for them, then you must have been hiding something from them before, and *now they want it in writing.* They have expressed to me and I can see you're pretty alarmed that they want to be represented by the Boilermakers International . . . the Organization thats members hold their heads high in the Labor Movement . . . no racketeers . . . nothing to hide from you. We sell nothing but good, true trade unionism and fight to maintain principles so that we may walk proudly and with dignity along with our fellow men. . . .

Enclosed with this letter for you, the employees, is a pamphlet that means exactly what it says. . . . Let's put it in writing. Don't Guess . . . Vote Yes . . . In the coming election.

THERON H. TISON, Spec. Repr.
Boilermakers Intl. Union,
AFL-CIO

Enc.

Respondent's Exhibit 7

200 Burnet Street, Ft. Worth, Texas
February 25, 1960 ED6-7453

GREETINGS TO THE EMPLOYEES OF EXCHANGE PARTS COMPANY

I want to take this opportunity to thank each and every one of you for the steadfast courage you have maintained in spite of adverse, anti-labor propaganda that the Company management has heaped upon you. I want to particularly ALERT YOU to what you may expect from the management in the final stages of desperation.

FIRST, at the dinner where you will be addressed by Mr. McDonald, and possibly Mr. Mueller, the Attorney—you will be told you are one big, happy family, and that the surprise he has in store for you is two (2) extra paid holidays. He will probably give you as one of these holidays, holiday pay for your Birthday.

NOW, he has tried to buy your vote ever since the Union started organizing your plant. PROMISES! PROMISES! PROMISES!

SECOND, in the writer's opinion, he will no doubt offer you a wage increase, possibly 25¢ per hour, but if he does this, he will no doubt tell you that you will receive this increase after you have voted the Union out of the picture, (the bribe tactics).

You are going to get your wage increase, and it is going to go through a Bargaining Committee selected by you, the employees, and REMEMBER ONE THING, anything he can promise now in his confused desperation to win votes can no doubt be doubled at the bargaining table.

THIRD—"Only the Company is capable of keeping its promises." This no doubt will be stressed.

You have seen how effectively the "management who is only capable of keeping its promises" worked in the past, so I am sure you have a pretty good idea how it would work in the future.

FOURTH—He will warn you that if the Union comes in there will be strikes, etc., and that you, the employees, will be out on the street, and new employees will take your place.

I have carefully gone over with each of you how a Union Strike is handled. With my next letter, you will receive a very interesting folder pertaining again to the strike which management tries to scare you with.

NOW TO SUMMARIZE THE ENTIRE SITUATION:

YOU HAVE BEEN PROMISED—YOU HAVE BEEN THREATENED—YOU HAVE NEVER BEEN AFFORDED ONE BIT OF PROTECTION SINCE YOU HAVE BEEN IN THE PLANT, BUT *NOW* YOU HAVE BECOME AN INDIVIDUAL WITH A *CERTAIN PRES-*

TIGE AND A VOTE IN YOUR *POCKET*, AND BELIEVE ME, MR. McDONALD IS SCARED!

Many of you, the employees, have asked the writer if SENIORITY starts when the Union contract is signed. The answer to this question is very simple—YES. Seniority starts the date you were hired by the Company and is protected by the UNION SENIORITY CLAUSES, which is one of the most important parts of the contract—it is your protection against discharge without sufficient cause. It is your protection when you are getting up in years. It is your protection against the "apple polishers." It is your protection of being afforded the first chance of upgrading for higher job classifications by your length of service with the Company. *IT IS YOUR PROTECTION!*

The enclosed pamphlet illustrates many points that you, the employees of Exchange Parts, are confronted with daily. REMEMBER, NOW YOU WALK ALONE. SOON YOU WILL WALK WITH 16½ MILLION ORGANIZED MEN AND WOMEN.

DON'T GUESS!! VOTE YES!! IN THE COMING ELECTION!!

Fraternally yours,

THERON H. TISON
Theron H. Tison, Special Representative Boilermakers International, AFL-CIO

oeiu #277
Encl.

Respondent's Exhibit 8

EXCHANGE PARTS COMPANY
FORT WORTH, TEXAS
January 5, 1960

BULLETIN

DUE TO THE TREMENDOUSLY INCREASED ACCOUNTING BURDEN IN PAYROLL PREPARATION CAUSED BY A LARGE INCREASE IN THE NUMBER OF EMPLOYEES, IT HAS BECOME NECESSARY TO MAKE THE FOLLOWING CHANGE IN OUR PAYROLL PROCEDURES:

THERE WILL BE A SPECIAL PAY PERIOD JANUARY 1, 1960 THROUGH WEDNESDAY JANUARY 6, 1960. ALL PAY CHECKS THEREAFTER WILL BEGIN ON THURSDAY AND END WEDNESDAY FOR THE REGULAR WORK WEEKS. THE SPECIAL PAY PERIOD STATED ABOVE WILL BE PROPERLY PRO-RATED SO NO ONE WILL LOSE ANY OVERTIME PAY RATE.

EXAMPLE:

INSTEAD OF THE BASE WORK WEEK FOR THIS PERIOD BEING 40 HOURS, THE BASE STRAIGHT TIME HOURS WORKED WILL BE 32 AND ALL HOURS WORKED IN EXCESS OF 32 WILL BE AT THE RATE OF 1½ TIMES BASE RATE.

PAY CHECKS WILL BE DISTRIBUTED EACH FRIDAY, THE SAME AS IN THE PAST.

THE REASON FOR MAKING THE CHANGE IN PAY WEEK IS PURELY TO GIVE OUR OFFICE ONE COMPLETE WORK-DAY TO PREPARE THE PAYROLL SO THAT CHECKS WILL BE AVAILABLE EACH FRIDAY.

C. V. McDONALD
VICE PRESIDENT AND GENERAL MANAGER

SOUTHWEST SHOE EXCHANGE COMPANY
809 CRADDOCK ST. FORT WORTH, TEX

No.00846

DATE	EMPLOYEE NO.	HOURS W	D	DESIGNATION OF HOURS	DEDUCTIONS	RATE	AMOUNT
2 17 0	01091	40		REGULAR VACATION		1.25	50.00
		9.5		OVERTIME VACATION		1.875	17.81
							67.81
					W/Tax		5.10 C
					FICA		2.03 C
					Grp Ins		2.16 C
				VACATION CHECK			
							9.29

DETACH BEFORE DEPOSITING

NOT - NEGOTIABLE

809 CRADDOCK ST. SOUTHWEST SHOE EXCHANGE COMPANY FORT WORTH, TEXAS No.00846

PERIOD ENDING	EMPLOYEE NO.
2 17 0	01091

PAY TO THE ORDER OF:

WINFRED E. HALL

37-1
1113

February 13, 1960

Fifty-eight and .52/100 Dollars

AMOUNT
58.52

SOUTHWEST SHOE EXCHANGE CO.
PAYROLL ACCOUNT

SIGNATURE

THE FIRST NATIONAL BANK
FORT WORTH, TEXAS

SIGNATURE

[176]

Respondent's Exhibit 11

114

177 IN THE UNITED STATES COURT OF APPEALS

(Title omitted)

Minute Entry of Argument and Submission—January 30, 1962

On this day this cause was called, and after argument by Alfred Brummel, Esq., Attorney, National Labor Relations Board, for petitioner, and Karl Mueller, Esq., for respondent, was submitted to the Court.

---

178 IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 19106

NATIONAL LABOR RELATIONS BOARD, *Petitioner*,

versus

EXCHANGE PARTS COMPANY, *Respondent*.

Petition for Enforcement of an Order of the National Labor Relations Board sitting at Washington, D. C. (Texas Case).

Opinion—June 22, 1962

Before RIVES, BROWN, and WISDOM, Circuit Judges.

WISDOM, Circuit Judge: This case presents the question whether it is an unfair labor practice for an employer to announce benefits to employees shortly before a representation election. In the absence of objective evidence of any taint of restraint or coercion by the employer, the benefits not being conditioned on the employees' renunciation of their right to organize or of any other rights, we hold that the announcement of employee benefits is not an un-
179 fair labor practice even if timed to have a persuasive effect on the election.

The Exchange Parts Company of Fort Worth, Texas, rebuilds automobile parts. Before November 1959 its employees were not represented by a union. November 4 the Company mailed to each employee a letter stating that its officials had recently returned from an industry conference at which "a great deal of emphasis was placed on *employee welfare*". The letter invited the employee and his wife to a dinner that night or the following night to discuss information important to the employees. At the dinners held November 4 and 5 C. V. McDonald, the vice president and general manager of Exchange Parts, announced that the 1959 floating holiday would be the day after Christmas and that the employees would receive an additional floating holiday during 1960. November 9 the International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, AFL-CIO, wrote the respondent that it represented a majority of the employees and requested a meeting to discuss contract terms. A week later the Union petitioned the National Labor Relations Board for a representation election. The Board held a hearing on the petition December 29 and issued an order February 19, 1960, scheduling an election March 18.

At the annual Christmas party in December McDonald did not annouce the date of the 1960 floating holiday. He testified that at that time the Company was investigating whether it would be feasible to allow each employee to take the holiday on his birthday. Around January 1 the study was completed. The Company concluded that the birthday holiday was feasible and allowed the employees to vote on whether they would prefer it to a regular
180 floating holiday. Since the only available place where the Company could hold an unsegregated meeting of all its employees, the Pioneer Palace, was unavailable in January, the dinner meeting was delayed until February 25. At the meeting the employees voted in favor of the birthday holiday. McDonald spoke during the meeting about the pending representation election. He said that the Union organizers had twisted some of the facts around to put the Company in a bad light, he pointed out the many benefits that the Company had given the employees, and he concluded by urging all the employees to vote in the election.

March 4 the Company wrote the employees asserting that they did not need a Union to obtain additional improvements in the future and asking the employees to vote against the Union. The letter announced as a benefit added in 1960 a new method for calculating overtime in the weeks containing a paid holiday. Under the old system the workers were paid for the hours not worked on the holiday but these hours were not included in the calculation of the workers' overtime earnings; since the regular work week included several overtime hours the employees did not earn as much in a holiday week as in a regular week. The new system gave the workers overtime as well as base rate credit for the holiday and thus removed the reduction in overtime pay. In announcing the change the letter stated, "This will mean $5 to $6 more per employee per holiday." Exchange Parts argues that this new overtime pay system was not introduced by the March 4 letter but instead was initiated July 4, 1959. The system was used that holiday and the Company announced that this was in accordance with company policy, but it did not state clearly that the policy would be followed for subsequent holidays.
181 The Union argued that the system was used then because July 4 fell on a Saturday when the employees normally work only half a day and therefore would not receive a full paid holiday. The new overtime system was not used for later holidays during 1959, which McDonald attributed to an error on the part of the accounting department. McDonald said that it was also an error that the new system was listed as a new benefit added during 1960 in the letter sent to the employees March 4, 1960.

The March 4 letter also stated that a new vacation system had been adopted during 1960 which would allow the employees to take an additional one and one-half days vacation. Before 1960 each employee was required to take his week of vacation during a regular pay week, beginning Friday morning and ending Thursday evening. The men were paid Friday for the preceding work week. At the end of 1959 the Company shifted the pay week forward one day to give the accounting department an extra day for making up the pay checks before distribution on Friday. The Company then decided to abandon the requirement that a

worker's vacation week coincide with the pay week, which with the new pay week would have scheduled the vacations from Thursday to Wednesday, and to allow employees to take a calendar week vacation. The change gave the employee a week-end at each end of his vacation and allowed him to be away for a longer time, although it did not grant him any actual increase in his paid vacation. The Company asserted that it established this policy at the start of 1960 and that during February certain employees took vacations on the new basis. The March 4, letter was, however, the first general announcement to all the employees of this new policy.

182 I.

The parties hotly dispute whether the birthday holiday, the holiday overtime pay, and the change in vacations represent an effort by Exchange Parts to influence the representation election by an increase in employee benefits just before the voting. The hearing examiner found that in 1955 Exchange Parts established its first paid holiday and announced that it would add an additional paid holiday each year. In 1958 there were four paid holidays. Early in 1959 McDonald announced that another paid holiday would be granted as a floating holiday. November 4 and 5 he announced that the new 1959 holiday would be the day after Christmas and also stated that in 1960 a sixth holiday would be added. Since there was no evidence to indicate that the Company knew of the Union's organizational campaign at that time, these findings clearly negate any inference that the sixth holiday was added as a result of the representation election or in an attempt to influence its outcome. The trial examiner found, however, that the announcement of the holiday was timed to influence the election. He stated, "I see no reason why McDonald could not have followed custom and announced the holiday at the Christmas party, or at least informed the employees the birthday holiday was then under consideration." He also questioned why the announcement of the plan for the birthday was delayed until the February 25 party.

We are unable to accept the imputation of blame to the Company on this point. There is no basis for the exam-

iner's finding that McDonald should have announced the 1960 holiday at the Christmas party, since McDonald already had made that announcement November 4 and

183 5. Nor is there any rational basis for the hearing examiner to conclude that McDonald was under an obligation to announce at the Christmas party that the birthday holiday was under consideration, under pain of an examiner and the Board concluding that such omission amounted to interference with union organization. On the contrary, it seems reasonable to us for the Company *not* to make an announcement about the birthday holiday that might stir up employee hopes and expectations until it had determined that the holiday was economically feasible. Finally, we can see no adequate basis for attributing an improper motive to the delay in the announcement until February 25, in view of the finding that a January meeting was not possible because of the unavailability of the Pioneer Palace. Such speculations do not reach the dignity of findings. See *N.L.R.B.* v. *McGahey*, 5 Cir., 1956, 233 F. 2d. 406.

The story takes a different turn when we come to the holiday overtime pay and the vacation period. In its March 4 letter the Company announced both of these as new benefits added in 1960. This letter by itself constitutes substantial evidence of the creation of these benefits. The only question Exchange Parts raises relates to the timing; the employer asserts that the new overtime pay was established in 1959. This assertion, to say the least, is not so overwhelming that it compels acceptance as a matter of law. One might well raise an eyebrow over the contention that both the accounting department and those responsible for drafting the March 4 letter would have made such errors, and that the errors would have gone unnoticed, if the Company really had established the increased overtime pay as a permanent policy July 4, 1959. The new vacation week

184 system may not be of prime importance but is a significant fringe benefit. It is a rational inference from the record that the new system was introduced in 1960 and announced generally for the first time in the March 4 letter. This is not the whole story, however.

The list of benefits in the March 4 letter shows that Exchange Parts, over the years, increased employee benefits as a regular matter of course. This and the announcement in the November 4 letter that the Company was anxious to do more to increase employee morale would have justified the fact-finder in concluding that the institution of new benefits was not caused by the pending representation election. On the other hand the hearing examiner could have believed that these new benefits were greater than they otherwise would have been. The Company's March 4 letter itself stated that the employee benefits were increased twenty per cent by the additions within the past year. The fact that these new benefits were announced just two weeks before the election in a letter urging the employees to vote against the Union indicates that the benefits were part of the Company effort to oppose the Union. An issue of fact was presented with substantial evidence on either side. In such a case the factual determinations fall to the hearing examiner and the Board, since the demeanor of the witnesses and subtle bits of evidence developed during the trial can be decisive. *Universal Camera Corp.* v. *N.L.R.B.*, 1951, 340 U. S. 474, 71 S. Ct. 456, 95 L. Ed. 456; *Washington, V. & M. C. Co.* v. *N.L.R.B.*, 1937, 301 U. S. 142, 57 S. Ct. 112, 81 L. Ed. 965. We therefore accept the hearing examiner's and the Board's finding that as to the holiday overtime pay and the vacation period Exchange Parts increased its employee benefits with an intent to influence the outcome of the representation election. This poses squarely the
185 legal question whether such action necessarily constitutes an unfair labor practice as defined and prohibited by 29 U.S.C.A. § 158 (a) (1).

The Board itself has said, "We do not mean that an employer is foreclosed from announcing or granting economic benefits during a union's oragnizational campaign or during the pendency of a Board-ordered election." Matter of Hudson Hosiery Co., 72 NLRB 1434 (1947). But the test stated in that decision is a fuzzy, subjective one: "What is unlawful under the Act is the employer's granting or announcing such benefits (although determined upon bona fide) *for the purpose* of causing the employees to accept or reject a representative for collective bargaining." (The

Board's emphasis.) Taking the other extreme, the Board has also said:

> "It is well settled that the test of interference, restraint, and coercion under Section 8 (a) (1) of the Act does not turn on the employer's motive or on whether the coercion succeeded or failed. The test is whether the employer engaged in conduct which, it may reasonably be said, tends to interfere with the free exercise of employee rights under the Act. Applying this test, we find that by announcing its change in overtime policy during the course of the organization campaign among office employees, the Respondent violated Section 8 (a) (1) of the Act." American Freightways, Inc., 124 NLRB 146 (1959)

See *N.L.R.B.* v. *Illinois Tool Works*, 7 Cir., 1946, 153 F. 2d 811, 814; *N.L.R.B.* v. *Ford Brothers*, 6 Cir., 1948, 170
186 F. 2d 735, 738. Here, the Board seem sconcerned solely with the *effect* of the timing of the announcement of the benefits. We find, from our study of the cases, that the courts do not accept any of these tests. The proper criterion is whether there is objective evidence of restraint or coercion, such as conditioning the benefits on the employees voting against the union or relinquishing rights of self-organization.

None of the cases we have examined presents as cleanly as this case the question of the right of an employer to grant benefits timed to achieve the persuasive effect that a union is unnecessary. Certain decisions hold the employer guilty of an unfair labor practice, but in all of these cases the increase in benefits was one part of an overall program of interference and restraint by the employer. On the other hand, at least three decision hold that the employer was justified in increasing benefits and that this did not constitute a Section 8 (a) (1) violation; in these however there was definite evidence indicating that the employer would have made the increases in the absense of the pending election. A consideration of these cases sets the frame of reference for the question raised by the instant case.

In *Medo Photo Supply Corp.* v. *N.L.R.B.*, 1943, 321 U. S. 678, 686, 64 S. Ct. 830, 88 L. Ed. 1007 the Supreme Court laid down the principle that the "action of employees with respect to the choice of their bargaining agents may be induced by favors bestowed by the employer as well as by his threats or domination". That principle must be applied in context, however. In Medo the Court applied it to an employer who granted wage increases conditioned on the employees abandoning a labor union previously designated as their bargaining representative.

187 One of the early cases indicating that it is improper to confer benefits on the employees to encourage opposition to a union is *Western Cartridge Co.* v. *N.L.R.B.*, 7 Cir., 1943, 134 F. 2d 240, 244. There the court made the frequently quoted statement that "interference is no less interference because it is accomplished through allurements rather than coercion." Again the facts differ considerably from those of the instant case. The company had required each employee to sign an individual employment contract. It had also encouraged the establishment of a union that was unaffiliated with any larger union organization and that dealt with matters not covered by the individual employment contracts. When an A. F. of L. union attempted to win recognition in the plant the company opposed it vigorously and urged its employees to stick with the unaffiliated union. The court held that the company dominated the unaffiliated union and that its open hostility to one union and support of another violated the unfettered freedom of choice that the Act intended for the employees to have. The "interference by allurements" in this case represented the support of a competing union rather than any benefit directly conferred on the employees, contrary to the Midwest Piping rule, 63 NLRB 1060 (1945). See Local 483, *Inter. Bro. of Boilermakers* v. *N.L.R.B.*, D.C. Cir., 1961, 288 F. 2d 166, *cert. denied*, 368 U. S. 832,

In *N.L.R.B.* v. *Crown Can Co.*, 8 Cir., 1943, 138 F. 2d 263, the employer warned his employees at a meeting that if they insisted on pushing the organization the plant would be closed. At the end of the meeting he said, "If it is a wage increase you want I will see what I can do about it." Four days later there was a general wage increase. The

Board found that these actions illegally restrained
188 and coerced the employees. In such a case coercion results from the squeeze in which the employees are placed. They are faced with a dilemma. If they reject the union they can retain their jobs and enjoy increased compensation; if they vote in a union they are threatened with losing the increased benefits and their jobs as well. The increase in benefits operates as a part of an overall scheme that puts substantial pressure on the employees and prevents them from exercising a free choice as to whether they wish to establish a union.

N.L.R.B. v. *West Coast Casket Co.*, 9 Cir., 1953, 205 F. 2d 902 closely resembles the Crown Can case. Here also the employer threatened that "if it went union, he would close the plant" and during the union's organization campaign announced new economic benefits; it announced the new benefits to various employees while interrogating them about their union sympathies. Here, as in Crown Can, the combination of the employer's acts tended to present each employee with the choice that he could go along with the employer or with the union but that he could not receive benefits from the employer and also exercise his right to organize a union.

A bare promise of future benefits is distinguishable from actual establishment of benefits; in some cases it is a fair inference that the benefits are contingent on a rejection of the union. It is well established that an employer cannot offer wage increases conditioned on the employees withdrawing from or voting against a union. *Medo Photo Supply Corp.* v. *N.L.R.B.*, 1944 U. S. 678, 64 S. Ct. 830, 88 L. Ed. 1007; *Joy Silk Mills* v. *N.L.R.B.*, D.C. Cir., 1950, 185 F. 2d 732, *cert. denied*, 341 U. S. 915; *N.L.R.B.* v.
189 *Bailey Co.*, 6 Cir., 1950, 180 F. 2d 278; *M. H. Ritzwoller Co.* v. *N.L.R.B.*, 7 Cir., 1940, 114 F. 2d 432.

A recent case, *N.L.R.B.* v. *Katz*, 1962, — U.S. —, — S. Ct. —, — L. Ed. 2d —, should also be mentioned briefly. In this decision the Supreme Court held that it was a violation of the duty to bargain collectively, imposed by Section 8 (a) (5), for an employer, without consulting a union with which it was negotiating, to grant merit increases, wage increases,

and announce a more generous sick-leave policy. There, however, the company was in the middle of bargaining negotiations and the changes were matters subject to mandatory bargaining. Such unilateral changes were a circumvention of the duty to negotiate "which frustrates the objectives of Section 8 (a) (5) much as does a flat refusal".

Judge Thurman Arnold was one of the first to emphasize that an employer is not guilty of an unfair labor practice "because he treated his employees well in order to forestall a union movement", or because he reminded them of that fact, claimed credit for it during a period of a union election, and even increased wages during an election period. *Peter J. Schweitzer, Inc.* v. *N.L.R.B.*, Ct. App. D.C., 1944, 144 F. 2d 520. In that case, just before an election, the employer sent a letter to the employees and during the election campaign put into effect a general wage increase. The letter implied, or might imply, reprisals or a denial of past benefits if the employees voted for the union. The Court therefore enforced the Board's cease and desist order but only "so far as it requires the petitioner to assure its employees that the benefits it is giving and the liberal labor policy it has adopted will not be changed because they vote for a union". The Court explained:

190 "We cannot agree . . . that an increase in wages or an improvement in working conditions made during an election period is an unfair labor practice provided there is no suggestion that these benefits would be withdrawn if a union is organized. Such a principle would mean that it is the duty of an employer to refrain from benefiting his employees in order to make them more inclined to vote for a union."

The first case we have found in which a court declined to enforce an order of the Board and approved the grant of benefits during a union campaign was *N.L.R.B.* v. *W. T. Grant Co.*, 4 Cir., 1953, 208 F. 2d 710. In ruling that the wage increase was not improper the Court relied on uncontradicted testimony that the increase was not considered until the store manager learned that a rival store in the same block planned to raise its wage level and that W. T.

Grant made a point of paying its employees as well as any neighboring store. The Court stated, "Certainly it cannot be laid down as a governing rule that during a union campaign, management must deny to its employees increased advantages which in the absence of the campaign would be granted." Similarly, the Court in *N.L.R.B.* v. *Cleveland Trust Co.*, 6 Cir., 1954, 214 F. 2d 95, 100, held that it was not improper for the company to increase wages before a union election when the reasons for the increases did not relate to the election. A contrary principle "would mean that it is the duty of the employer to refrain from benefiting his employees in order to make them more inclined to vote for a union." This Court reached the same result in *N.L.R.B.* v. *The Newton Company*, 5 Cir. 1956, 236 F. 2d 438.

191 The statute under which the N.L.R.B. issued its cease and desist order, 29 U.S.C.A. § 158 (a) (1), provides that it shall be an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title." Section 157 grants employees the right "to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." The terms "interfere with, restrain, or coerce" have closely overlapping meanings and connotation. We understand the three terms to encompass one general group of activities, rather than to set out three separate categories. Each term must therefore be construed with a view to the implications of the other terms. These words, especially "restrain" and "coerce" are strong ones, which carry a suggestion of force and compulsion. The pertinent dictionary meaning of "interfere" is "to come in collision; to clash; also, to be in opposition; to run at cross-purposes . . . to enter into, or take a part in, the concerns of others; to intermeddle; interpose, intervene." "Restrain" is defined as meaning "to keep in check; to hold back from acting, proceeding, or advancing, either by physical or moral force, or by any interposing obstacle; to repress or suppress; to curb." The definition

given for "coerce" is "to constrain or restrain by force, esp, by law or authority; to repress; curb." Webster's New International Dictionary (2d Ed. unabridged, 1958). The dictionary meanings coincide with the common meanings. We note that these terms stand in contrast to such terms as "persuade" or "induce" which would also describe conduct designed to influence the actions of another but by non-compulsive means.

192 This provision has been liberally construed. As the court stated in *Rapid Roller Co.* v. *N.L.R.B.*, 7 Cir., 1942, 126 F. 2d 452, 457, "it is not necessary to show duress but only interference, and it is not necessary that the interference shall be successful in preventing organization." The provision has been used to prohibit a multitude of sins: a threat by an employer that he would not rehire any employees who went out on strike, *Collins Baking Co.* v. *N.L.R.B.*, 5 Cir., 1951, 193 F. 2d 483; anti-union interrogation of employees and requests that they withdraw from the union. *N.L.R.B.* v. *Economy Furniture*, 5 Cir., 1960, 284 F. 2d 339; threats by employer that he would close down the plant before it would have a union and the discriminatory discharge of employees because of their union activities, *N.L.R.B.* v. *Ferguson*, 5 Cir., 1958, 257 F. 2d 88; constant surveillance of an employee after the employer has learned of his union activities, *N.L.R.B.* v. *Gate City Cotton Mills*, 5 Cir., 1948, 167 F. 2d 647, 649. All of these employer actions proscribed by the statute bear the identifying feature of a threat or an act to punish the employees for their union activities. The statutory purpose is to protect the worker from such employer pressures and enable him to decide whether he wishes to join and support a union without the fear that his decision to do so will jeopardize his relations with his employer. Decisions enjoininng an employer from making a promise of benefits are consonant with this purpose, since such promises exert a similar pressure on the employees: they may exercise their union rights only by sacrificing employment benefits. The promise of a benefit for abstaining from union activities is a more moderate device than the threat of punishment for participating in union activities, but its operation is essentially the same.

193 The announcement of new benefits by Exchange Parts in the instant case differs tellingly from the actions prohibited by this wide range of cases. Here the benefits were put into effect unconditionally on a permanent basis, and no one has suggested that there was any implication the benefits would be withdrawn if the workers voted for the union. The employees were as free after the establishment of the new benefits as they were beforehand to vote for or against the union according to their own wishes, untrammelled by considerations of the impact their decision would have on their job security, compensation, or relations with the employer. Of course, we regard as vital the fact that the benefits were announced before the certification of the union as the bargaining agent of the employees. If, on the other hand, the employees had previously selected a union as their representative, as in *N.L.R.B.* v. *Katz*, the employer's unilateral changes would have been a serious interference with orderly procedure in the collective bargaining process.

The argument that an increase of benefits by the employer may persuade the employees not to vote for the union overlooks the fact that the employer is entitled to try to persuade his employees to vote against a union, provided that he does so by non-coercive means. "Anti-union bias, strong convictions against unions or opposition to the underlying philosophy of the Labor Management Relations Act is not itself an unfair labor practice. In a free democracy, it is the citizen, not the Government, who fixes his own beliefs." *N.L.R.B.* v. *McGahey*, 5 Cir., 1956, 233 F. 2d 406, 409. The right of the employer to make his appeal to the workers is expressly preserved by the statute. "The expressing of any views, argument, or opinon, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute
194 or be evidence of an unfair labor practice under any of the provisions of this subchapter, if such expression contains no threat of reprisal or force or promise of benefit." 29 U.S.C.A. § 158 (c). Although freedom to increase benefits in an effort to make a union seem unnecessary does not follow as a necessary incident

of the right to argue against the union, it is scarcely any more coercive. Also, although the limitation on the expression of views to exclude a threat of reprisal or force or a promise of a benefit is not in terms an exclusive limitation, it is significant that this is where the authors of the provision chose to draw the line. The whole tenor of the statutory language and decisions interpreting it indicates that the evil to which the statute is directed is the use of force and pressure. Persuasive efforts are not outlawed. Testing the increase of benefits effected by Exchange Parts against these considerations, we feel that this action is persuasive, not coercive.

Practical considerations support this result. We would be reluctant to announce any sort of a rule that inhibited employers from improving working conditions, increasing wages, and reducing hours of labor. Unlike most actions of interference or coercion, an increase in benefits operates to the advantage of workers. It would be ironic if a labor law had the result of discouraging benefits for labor. The problem is intensified by the fact that in many cases it would be difficult—if not impossible—to determine whether an increase of benefits is made to discourage unionization or for other "legitimate" reasons. Labor would stand to lose not only where an anti-union motivation actually existed but also in some cases where the employer for other reasons wished to increase benefits but feared being charged with an unfair labor practice. Extension
195 of the statute's prohibitions to cover this sort of a case would thus act as a burden on both management and labor.

Summarizing, the critical fact in this case is that the benefits carried no coercive element; they were not conditioned upon the employees' relinquishment of any rights. The employes had, as the Act intended the employees to have, an unfettered right of self-organization, a free choice. It is impressive logomachy to turn "allurements" into "coercion" by divining a secret purpose. It is good, homey, country-lawyer advocacy to argue that a carrot on a stick may have the same effect on a donkey as a club.

This is beguiling bewording. But a carrot is not a club. Labor is not a donkey. Persuasion is not coercion.[1]

Enforcement of the Board order is

DENIED.

---

[1] In an analogous situation this Court held that even during bargaining negotiations an employer may engage in a lockout for the purposes of enhancing the acceptance of the company's terms rather than the union's terms. "A lockout may, under the facts of a particular case, amount to a violation of § 8 (a) (1) or § 8 (a) (3) or of § 8 (a) (5) or all three . . . But unless the facts support a conclusion of a violation, then resort to a lockout may not be made a violation simply on the ground that this gives advantage to the employer. . . ." NLRB v. Dalton Brick & Tile Corp., 5 Cir., 1962 F. 2d

. The Supreme Court has said as to Section 8 (a) (3): "Thus this section does not outlaw all encouragement or discouragement of membership in labor organizations; only such as is accomplished by discrimination is prohibited. Nor does this section outlaw discrimination in employment as such: only such discrimination as encourages or discourages membership in a labor organization is proscribed." Radio Officers' Union v. NLRB, 1954, 347 U. S. 17, 42, 43, 74 S. Ct. 323, 98 L. Ed. 455. Justice Harlan, concurring in a recent opinion, points out: "What in my view is wrong with the Board's position in these cases is that a mere showing of foreseeable encouragement of union status is not a sufficient basis for a finding of violation of the statute. It has long been recognized that an employer can make reasonable business decisions, unmotivated by an intent to discourage union membership or protected concerted activities, although the foreseeable effect of these decisions may be to discourage what the act protects. For example, an employer may discharge an employee because he is not performing his work adequately, whether or not the employee happens to be a union organizer. * * * Yet a Court could hardly reverse a Board finding that such firing would foreseeably tend to discourage union activity. Again, an employer can properly make the existence or amount of a year-end bonus depend upon the productivity of a unit of the plant, although this will foreseeably tend to discourage the protected activity of striking. * * * A union, too, is privileged to make decisions which are reasonably calculated to further the welfare of all the employees it represents, nonunion as well as union, even though a foreseeable result of the decision may be to discourage union membership." Local 357, International Brotherhood of Teamsters, etc. v. NLRB, U. S. , , 6 L. Ed, 2d 11.

197 IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 19106

NATIONAL LABOR RELATIONS BOARD, *Petitioner*,

v.

EXCHANGE PARTS COMPANY, *Respondent*.

Decree Entered July 23, 1962

Before: Rives, Brown and Wisdom, Circuit Judges.

By the Court:

THIS CAUSE came on to be heard upon the petition of the National Labor Relations Board for the enforcement of a certain order issued by it against the aforesaid Respondent on May 26, 1961. The Court heard argument of respective counsel on January 30, 1962, and has considered the briefs and transcript of record filed in this cause. On June 22, 1962, the Court being fully advised in the premises, handed down its decision denying Board's petition for enforcement of its order.

ON CONSIDERATION WHEREOF, it is ordered, adjudged and decreed by the United States Court of Appeals for the Fifth Circuit that enforcement of the said order of the National Labor Relations Board directed against Exchange Parts Company, its officers, agents, successors and assigns, be and it hereby is denied.

(File endorsement omitted)

---

198 (Clerk's Certificate to foregoing transcript omitted in printing)

---

199 SUPREME COURT OF THE UNITED STATES

No. , October Term, 1962

NATIONAL LABOR RELATIONS BOARD, *Petitioner*,

v.

EXCHANGE PARTS COMPANY

Order Extending Time to File Petition for Writ of Certiorari—September 18, 1962

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including Oct. 20th, 1962.

HUGO L. BLACK
Hugo L. Black

Associate Justice of the Supreme Court of the United States.

Dated this 16th day of September, 1962.

---

200 SUPREME COURT OF THE UNITED STATES

No. 537, October Term, 1962

NATIONAL LABOR RELATIONS BOARD, *Petitioner*,

v.

EXCHANGE PARTS COMPANY

Order Allowing Certiorari—May 27, 1963

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit is granted, and the case is placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

☆ U. S. GOVERNMENT PRINTING OFFICE 1963—686320/P.O.120

INDEX

	Page
Opinions below	1
Jurisdiction	2
Question presented	2
Statute involved	2
Statement	3
I. The Board's findings of fact	3
II. The Board's conclusions and order	6
III. The decision of the court of appeals	6
Reasons for granting the writ	7
Conclusion	14
Appendix	15

CITATIONS

Cases:

American Freightways, Inc., 124 NLRB 146	13
Bata Shoe Co., Inc., 116 NLRB 1239	13
Bonwit Teller, Inc. v. *National Labor Relations Board*, 197 F. 2d 640, certiorari denied, 345 U.S. 905	12
Burns Brick Co., 80 NLRB 389	12
Campbell & McLean, Inc., 106 NLRB 1049	12
Fiss Corporation, 43 NLRB 125	10
Hudson Hosiery Co., 72 NLRB 1434	13
Indiana Metal Products Corp. v. *National Labor Relations Board*, 202 F. 2d 613	8, 11
Jackson Tile Mfg. Co., 122 NLRB 764	12
Jacob H. Klotz, 13 NLRB 746	10
Joy Silk Mills, Inc. v. *National Labor Relations Board*, 185 F. 2d 732, certiorari denied, 341 U.S. 914	10, 11
Lowell Sun Publishing Co., 136 NLRB No. 16	13

662332—62——1

Cases—Continued

	Page
May Department Stores Co. v. *National Labor Relations Board*, 326 U.S. 376	9
Medo Photo Supply Corp. v. *National Labor Relations Board*, 321 U.S. 678	9, 10
National Labor Relations Board v. *Bailey Company*, 180 F. 2d 278	10
National Labor Relations Board v. *Brown-Dunkin Co.*, 287 F. 2d 17	10
National Labor Relations Board v. *Cleveland Trust Co.*, 214 F. 2d 95	12
National Labor Relations Board v. *Crown Can Co.*, 138 F. 2d 263	9
National Labor Relations Board v. *Houston Chronicle Publishing Co.*, 211 F. 2d 848	10
National Labor Relations Board v. *Jamestown Sterling Corp.*, 211 F. 2d 725	9
National Labor Relations Board v. *Pyne Molding Corp.*, 226 F. 2d 818	8, 11
National Labor Relations Board v. *Thompson & Co.*, 208 F. 2d 743	9
National Labor Relations Board v. *Valley Broadcasting Co.*, 189 F. 2d 582	9
National Labor Relations Board v. *West Coast Casket Co.*, 205 F. 2d 902	9
National Labor Relations Board v. *W. T. Grant Co.*, 208 F. 2d 710	12
Peter J. Schweitzer, Inc. v. *National Labor Relations Board*, 144 F. 2d 520	10
Pyne Molding Corp., 110 NLRB 1700	13
Radio Officers' Union v. *National Labor Relations Board*, 247 U.S. 17	10
Reeves Instrument Corp., 104 NLRB 610	13
Standard Coil Products, Inc., 99 NLRB 899	13
True Temper Corp., 127 NLRB 839	13

Cases—Continued

	Page
Western Cartridge Co. v. *National Labor Relations Board*, 134 F. 2d 240, certiorari denied, 320 U.S. 746	9
W. C. Nabors Co., 89 NLRB 538	12
Willard's Shop Rite Markets, Inc. 132 NLRB 1146	13

Statute:

National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*):

Section 7	2–3
Section 8(a)(1)	3, 6, 7, 8, 9, 10, 11, 13
Section 8(a)(3)	10
Section 8(c)	11, 12

In the Supreme Court of the United States

OCTOBER TERM, 1962

No. —

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

EXCHANGE PARTS COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Solicitor General, on behalf of the National Labor Relations Board, petitions for a writ of certiorari to review the judgment of the Court of Appeals for the Fifth Circuit entered in this case on July 23, 1962.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, pp. 15–32) is reported at 304 F. 2d 368. The Board's decision and order (R. 75–80)[1] are reported at 131 NLRB 806.

[1] "R." refers to Volume I, Transcript of Record, filed in the court of appeals; "B.A." refers to the appendix to the brief filed by the Board therein. References preceding a semicolon are to the Board's findings; succeeding references are to the supporting evidence.

JURISDICTION

The judgment of the court of appeals was entered on July 23, 1962 (App., *infra*, p. 33). On September 18, 1962, Mr. Justice Black extended the time for filing a petition for a writ of certiorari to and including October 20, 1962. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and Section 10(e) of the National Labor Relations Act, as amended, 29 U.S.C. 160(e).

QUESTION PRESENTED

Whether an employer violates Section 8(a)(1) of the National Labor Relations Act by granting economic benefits to its employees during the course of a union organizational campaign and immediately prior to a Board-ordered representation election, for the purpose of inducing the employees to reject the union in the election.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*) are as follows:

> SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condi-

tion of employment as authorized in section 8(a)(3).

SEC. 8. (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * * *

STATEMENT

I. THE BOARD'S FINDINGS OF FACT

On November 9, 1959, the Union[1] advised the Company by letter that it was engaged in an organizational campaign at the Company's plant, and that a majority of the Company's employees had designated the Union as their bargaining representative. The Union requested a meeting at the Company's earliest convenience to discuss contract terms (R. 33; B.A. 48–50). Although the Company concededly received the Union letter, there is no evidence that it made any reply (R. 33).

On November 4, four days before the Union's letter, the Company invited the employees to attend one of two dinners which would be held that night and the following night in the plant lunchroom (R. 34; B.A. 54). The purpose of the meetings, the Company stated, was to discuss "Some information of vital importance to you, your family, your Company" and the industry (B.A. 54). In apologizing for not giving the employees earlier notice, the Company explained that the "information * * * is of such importance that it should not wait" (B.A. 55). At the meetings

[1] International Brotherhood of Boilermakers, Iron Shipbuilders, Blacksmiths, Forgers and Helpers, AFL–CIO.

Company Vice-President and General Manager, C. V. McDonald, announced that the "floating holiday" for 1959 would fall on the day after Christmas, and that the employees would receive an additional "floating" holiday in 1960 (R. 34; B.A. 27).[3]

On November 16, the Union petitioned the Board for a representation election among the Company's employees, and on December 29, the Board conducted a hearing on the petition. On February 19, 1960, the Board directed that an election be held (R. 33; B.A. 9).

Six days later, on February 25, the Company sponsored an employee dinner at the Pioneer Palace in Fort Worth. Although Vice-President McDonald had stated in November that the additional holiday in 1960 would be a "floating" holiday, he now announced that the employees could vote on whether the new holiday should be "floating" or the employee's birthday. The employees voted in favor of the birthday holiday (R. 34; B.A. 11, 21, 36).[4] McDonald then referred to the pending representation election, and told the employees that their vote would decide whether they "wished to hand over their rights to speak and act for themselves" (R. 35; B.A. 12).

---

[3] In 1955, the Company had established its first paid holiday, and had added one each year thereafter, so that by 1958 there were four paid holidays. Early in 1959, it had announced that the additional holiday in 1959 would be a "floating one," *i.e.*, it would come the day following one of the four already established (R. 34; B.A. 24–25, 27, 28).

[4] This was the first time that the employees were allowed to determine when their additional paid holiday would fall (R. 34; B.A. 36).

On March 4, 1960, the Company sent its employees a letter disparaging the Union's "empty promises," and asserting that it would not "take a Union to get additional improvements in the future" (R. 35; B.A. 38–39). An accompanying pamphlet read in relevant part as follows (B.A. 45, emphasis in original):

> FACTS YOU SHOULD KNOW ABOUT YOUR BENEFITS AT EPCO
>
> * * * * *
>
> In *1960* the following benefits have been added or increased (thus far):
>
> Added a SIXTH paid holiday (your birthday)[5] No loss of overtime pay during the week a paid holiday is given. This will mean $5.00 to $6.00 more per employee per holiday
>
> * * * * *
>
> Vacation time extended 1½ days[6]
> Better discount on merchandise purchased
> More recreational activities
>
> * * * * *

---

[5] Under the new overtime system, paid holidays were to be treated as time on the job in computing overtime pay (R. 36; B.A. 13–14). Previously, paid holidays were not counted as time worked in computing overtime pay. The only exception was the July 4 holiday in 1959, when the employees' pay was computed on the basis of the formula alluded to in the March 4 bulletin.

[6] Respondent operated on a five-and-a-half day week, including half a day on Saturday. Prior to the union campaign, the vacation week ran from Friday through Thursday with only one week-end in between. Under the new plan, vacations would begin on a Monday so that an employee taking a week's vacation could leave work at noon on Saturday and return a week from the following Monday. By thus having an extra week-end of leave, his vacation was extended by one and a half days (R. 36–37; B.A. 15–16).

662332—62——2

These benefits [those set forth above as well as those granted in prior years] amount to 42 *cents* per hour *over and above your regular pay*—and have increased approximately 20 percent in the past year alone.

* * * * *

Vote No ——————— Grow With EPCO!

On March 18, 1960, the Board election was held, and the Union was defeated (R. 33).

II. THE BOARD'S CONCLUSIONS AND ORDER

On the foregoing facts, the Board concluded that the Company announced and granted the sixth holiday and increased overtime and vacation benefits, shortly before the representation election, for the purpose of inducing its employees to reject the Union. Accordingly, the Board found that the Company interfered with and restrained the employees in the exercise of their organizational rights, in violation of Section 8(a)(1) of the Act (R. 76, 39–41). The Board's order directed the Company to cease and desist from the unfair labor practices found and from any like or related illegal conduct, and required it to post appropriate notices (R. 77–78).[1]

III. THE DECISION OF THE COURT OF APPEALS

The court below denied enforcement of the Board's order. It agreed that there was substantial evidence

[1] The Trial Examiner had also found that the Company's action interfered with the election, and recommended that the election be set aside (R. 41). Subsequently, however, the Union withdrew its representation petition, thus closing the representation proceeding (R. 76).

to support the Board's finding that the increased overtime and vacation benefits were introduced and announced for the first time on March 4, 1960, were granted as part of the Company's effort to oppose the Union, and were intended to influence the outcome of the representation election (App., *infra*, p. 21).* Nevertheless, the court held that the grant of these benefits did not violate Section 8(a)(1) because there was no "objective evidence of restraint or coercion, such as conditioning the benefits on the employees voting against the union or relinquishing rights of self-organization" (App., *infra*, p. 22). In the court's view, the terms "interfere with, restrain, or coerce" in Section 8(a)(1) are confined to "the use of force and pressure. Persuasive efforts are not outlawed." Since "the benefits were put into effect unconditionally on a permanent basis, and no one has suggested that there was any implication the benefits would be withdrawn if the workers voted for the union," they could not "coerce" the employees, but merely "persuade" them, to vote against the Union. (App. *infra*, pp. 29–30.)

REASONS FOR GRANTING THE WRIT

The holding of the court below, that an employer does not commit an unfair labor practice by granting economic benefits prior to a Board election for the

*The court, however, found the evidence insufficient to support a finding that the grant of the extra holiday was so motivated, for there was no indication that the Company had knowledge of the Union's organizational campaign when that holiday was first announced (App., *infra*, pp. 18–20).

purpose of influencing his employees' choice of a representative, is in direct conflict with the decisions of two other circuits. It overturns a long settled rule of great importance to employees and employers under the National Labor Relations Act.

1. The decision of the court below is in direct conflict with *National Labor Relations Board* v. *Pyne Molding Corp.*, 226 F. 2d 818, 820 (C.A. 2), and *Indiana Metal Products Corp.* v. *National Labor Relations Board*, 202 F. 2d 613, 620 (C.A. 7). In *Pyne*, shortly after the union filed a petition for a representation election, the employer granted the employees a wage increase and an extra holiday, and, after the Board directed an election, announced a liberalization of vacation schedules and certain additional benefits. The Second Circuit sustained the Board's conclusion that this action constituted interference and restraint in violation of Section 8(a)(1) of the Act, since the evidence justified the inference that the benefits were granted for the purpose of thwarting the organization of the employees. Similarly, in *Indiana Metal*, after the union appeared on the scene, the employer announced new insurance benefits. The Board found that the employer thereby violated Section 8(a)(1) of the Act, as his purpose was to defeat self-organization. The Seventh Circuit sustained this finding, specifically rejecting as irrelevant the fact that "no strings were attached to the offer and [there were] no threats to withdraw the benefits if the employees persisted in supporting the union" (202 F. 2d at 620).

These decisions[9] rest on the principle that Section 8(a)(1) of the Act bars the employer from using his economic power—whether it take the form of coercion or allurement—for the purpose of influencing his employees' choice of a representative.[10] For an employer to grant benefits to the employees during the course of an organizing campaign or before a Board election, for the specific purpose of inducing the employees to reject the union, is a flagrant example of such use of economic power. It is likely seriously to affect the employees' freedom of choice, because it emphasizes "to the employees that there is no necessity for a collective bargaining agent" (*May Department Stores Co.* v. *National Labor Relations Board*, 326 U.S. 376, 385).

We do not suggest that the pendency of a Board election would bar an employer from granting a wage increase or other economic benefit in order to achieve a legitimate business purpose (see p. 12, *infra*). Here,

[9] See also, *National Labor Relations Board* v. *Valley Broadcasting Co.*, 189 F. 2d 582, 586 (C.A. 6); *National Labor Relations Board* v. *Jamestown Sterling Corp.*, 211 F. 2d 725, 726 (C.A. 2); *National Labor Relations Board* v. *Thompson & Co.*, 208 F. 2d 743, 748 (C.A. 2); *National Labor Relations Board* v. *Crown Can Co.*, 138 F. 2d 263, 266 (C.A. 8); *National Labor Relations Board* v. *West Coast Casket Co.*, 205 F. 2d 902, 905 (C.A. 9).

[10] The "action of employees with respect to the choice of their bargaining agents may be induced by favors bestowed by the employer as well as by his threats or domination." *Medo Photo Supply Corp.* v. *National Labor Relations Board*, 321 U.S. 678, 686. "[I]nterference is no less interference because it is accomplished through allurements rather than coercion, when, as here, the system is employed to stem a tide of organization * * *." *Western Cartridge Co.* v. *National Labor Relations Board*, 134 F. 2d 240, 244 (C.A. 7), certiorari denied, 320 U.S. 746.

as in many other instances arising under Sections 8(a)(1) and (3) of the Act, the question whether particular conduct of an employer constitutes an unfair labor practice turns upon the motivation from which that conduct springs.[11] Where, as in this case, benefits are granted for the purpose of thwarting the union, Section 8(a)(1) of the Act is violated, just as it is by a promise of benefits which is similarly motivated. See *Medo Photo Supply Corp.* v. *National Labor Relations Board*, 321 U.S. 678, 685–686; *Joy Silk Mills, Inc.* v. *National Labor Relations Board*, 185 F. 2d 732, 739 (C.A.D.C), certiorari denied, 341 U.S. 914; *National Labor Relations Board* v. *Baily Company*, 180 F. 2d 278 (C.A. 6).

The holding of the court below that Section 8(a)(1) only prohibits the employer from using his economic power to defeat the union when his action takes the form of "force and pressure," but not when it takes the form of "persuasion," is incompatible with the foregoing principle and decisions, and constitutes an unwarranted narrowing of the scope of that section.[12]

---

[11] *E.g.*, compare *National Labor Relations Board* v. *Brown-Dunkin Co.*, 287 F. 2d 17, 19 (C.A. 10) with *National Labor Relations Board* v. *Houston Chronicle Publishing Co.*, 211 F. 2d 848, 851 (C.A. 5) (adoption of independent contractor system, with consequent discharge of employees); and *Fiss Corporation*, 43 NLRB 125, 138 with *Jacob H. Klots*, 13 NLRB 746 (movement of plant to another town). See also *Radio Officers' Union* v. *National Labor Relations Board*, 347 U.S. 17, 42–44.

[12] The only judicial support for the view of the court below is a comment by Judge Arnold in his opinion in *Peter J. Schweitzer, Inc.* v. *National Labor Relations Board*, 144 F. 2d 520, 524 (C.A.D.C.) (App., p. 26, *infra*). We believe that the

2. The court below distinguished *Pyne* and *Indiana Metal*, *supra*, and other similar cases (n. 9, *supra*), on the ground that in those cases, unlike here, the employer had engaged in other unfair labor practice conduct in addition to the Section 8(a)(1) violation. (App., *infra*, pp. 22–25.) This ground, we submit, is insubstantial. In both *Pyne* and *Indiana Metal* the additional unfair labor practices did not have any bearing on the principle to be applied in interpreting Section 8(a)(1); such practices merely served, in the individual case, to establish or buttress the finding that the economic benefits were granted for an anti-union purpose. But the illegal motivation may be established by other circumstances, such as the timing of the employer's action and his announced hostility to the union. Where, as here, the circumstances are sufficient to warrant an inference that the benefits were granted for the purpose of inducing the employees to reject the union, it is immaterial that the employer did not commit other unfair labor practices which would confirm that purpose.

Nor is the court's interpretation of Section 8(a)(1) justified by the other considerations upon which it relied. It is not necessary to restrict the section to "force and compulsion" in order to leave room for the employer's right, guaranteed by Section 8(c) of the

---

correct principle was stated by Judge Edgerton in his dissenting opinion in that case (144 F. 2d at 526–527), and the District of Columbia Circuit has adhered to it in the subsequent *Joy Silk Mills* case, *supra*.

Act,"[13] to "persuade" the employees that a union is not needed. Nothing in the cases set forth above precludes the employer from expressing his views and opinions on the subject of a union for his employees. The only thing which is precluded is his use of economic power for the purpose of influencing the employees' choice. Moreover, nothing in those cases requires the employer to "stand still" just because a union organizing campaign is under way. He is free to institute changes in wages or other conditions of employment, provided that the changes are motivated by legitimate economic considerations and not by a desire to defeat the union.[14]

3. The decision of the court below, if left standing, would radically change the ground rules under which thousands of union organizational drives and representation elections are annually conducted. For the ability to grant wage increases or other economic benefits at crucial junctures in an organizing campaign is a subtle and effective weapon in the hands of employers who wish to block unionization of their

[13] Section 8(c) provides: "The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit."

[14] See *National Labor Relations Board* v. *W. T. Grant Co.*, 208 F. 2d 710, 712 (C.A. 4); *National Labor Relations Board* v. *Cleveland Trust Co.*, 214 F. 2d 95, 98–100 (C.A. 6); *Bonwit Teller, Inc.* v. *National Labor Relations Board*, 197 F. 2d 640, 644–656 (C.A. 2), certiorari denied, 345 U.S. 905; *Burns Brick Co.*, 80 NLRB 389; *W. C. Nabors Co.*, 89 NLRB 538; *Campbell & McLean, Inc.*, 106 NLRB 1049; *Jackson Tile Mfg. Co.*, 122 NLRB 764.

plants. Recognizing the dangers inherent in the use of this technique, the Board has long held that the granting or annoucement of economic benefits during a union organizational campaign or during the period preceding a representation election constitutes unlawful interference with employee rights, in violation of Section 8(a)(1) of the Act, where such action is taken for the purpose of inducing employees to reject the union. *Hudson Hosiery Co.*, 72 NLRB 1434; *Standard Coil Products, Inc.*, 99 NLRB 899; *Reeves Instrument Corp.*, 104 NLRB 610; *Pyne Molding Corp.*, 110 NLRB 1700; *Bata Shoe Co., Inc.*, 116 NLRB 1239; *True Temper Corp.*, 127 NLRB 839, 843–844; *Willard's Shop Rite Markets, Inc.*, 132 NLRB 1146; *Lowell Sun Publishing Co.*, 136 NLRB No. 16.[18] The decision of the court below undermines this well settled Board view. Moreover, it will provide employers opposing unionization with added incentive to resort to the use of economic power, rather than legitimate persuasion. A decision with such serious potentialities clearly warrants review by this Court.

[18] Although there is language in *American Freightways, Inc.*, 124 NLRB 146, which suggests that motive may be irrelevant, the later decisions, *supra*, as well as those in n. 14, *supra*, negate that suggestion. See, in particular, the discussion of *American Freightways* in *True Temper Corp.*, *supra*.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted.

ARCHIBALD COX,
Solicitor General.

STUART ROTHMAN,
General Counsel,

DOMINICK L. MANOLI,
Associate General Counsel,

NORTON J. COME,
Assistant General Counsel,

LEE M. MODJESKA,
Attorney,
National Labor Relations Board.

OCTOBER 1962.

APPENDIX

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 19106

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

EXCHANGE PARTS COMPANY, RESPONDENT

PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD SITTING AT WASHINGTON, D.C. (TEXAS CASE)

(June 22, 1962)

Before RIVES, BROWN, and WISDOM, *Circuit Judges.*

WISDOM, *Circuit Judge:* This case presents the question whether it is an unfair labor practice for an employer to announce benefits to employees shortly before a representation election. In the absence of objective evidence of any taint of restraint or coercion by the employer, the benefits not being conditioned on the employees' renunciation of their right to organize or of any other rights, we hold that the announcement of employee benefits is not an unfair labor practice even if timed to have a persuasive effect on the election.

The Exchange Parts Company of Fort Worth, Texas, rebuilds automobile parts. Before November 1959 its employees were not represented by a union. November 4 the Company mailed to each employee a letter stating that its officials had recently returned

from an industry conference at which "a great deal of emphasis was placed on *employee welfare*". The letter invited the employee and his wife to a dinner that night or the following night to discuss information important to the employees. At the dinners held November 4 and 5 C. V. McDonald, the vice president and general manager of Exchange Parts, announced that the 1959 floating holiday would be the day after Christmas and that the employees would receive an additional floating holiday during 1960. November 9 the International Brotherhood of Boilermakers, Iron Shipbuilders, Blacksmiths, Forgers and Helpers, AFL–CIO, wrote the respondent that it represented a majority of the employees and requested a meeting to discuss contract terms. A week later the Union petitioned the National Labor Relations Board for a representation election. The Board held a hearing on the petition December 29 and issued an order February 19, 1960, scheduling an election March 18.

At the annual Christmas party in December McDonald did not announce the date of the 1960 floating holiday. He testified that at that time the Company was investigating whether it would be feasible to allow each employee to take the holiday on his birthday. Around January 1 the study was completed. The Company concluded that the birthday holiday was feasible and allowed the employees to vote on whether they would prefer it to a regular floating holiday. Since the only available place where the Company could hold an unsegregated meeting of all its employees, the Pioneer Palace, was unavailable in January, the dinner meeting was delayed until February 25. At the meeting the employees voted in favor of the birthday holiday. McDonald spoke during the meeting about the pending representation election. He said that the Union organizers had twisted some

of the facts around to put the Company in a bad light, he pointed out the many benefits that the Company had given the employees, and he concluded by urging all the employees to vote in the election.

March 4 the Company wrote the employees asserting that they did not need a Union to obtain additional improvements in the future and asking the employees to vote against the Union. The letter announced as a benefit added in 1960 a new method for calculating overtime in the weeks containing a paid holiday. Under the old system the workers were paid for the hours not worked on the holiday but these hours were not included in the calculation of the workers' overtime earnings; since the regular work week included several overtime hours the employees did not earn as much in a holiday week as in a regular week. The new system gave the workers overtime as well as base rate credit for the holiday and thus removed the reduction in overtime pay. In announcing the change the letter stated, "This will mean $5 to $6 more per employee per holiday." Exchange Parts argues that this new overtime pay system was not introduced by the March 4 letter but instead was initiated July 4, 1959. The system was used that holiday and the Company announced that this was in accordance with company policy, but it did not state clearly that the policy would be followed for subsequent holidays. The Union argued that the system was used then because July 4 fell on a Saturday when the employees normally work only half a day and therefore would not receive a full paid holiday. The new overtime system was not used for later holidays during 1959, which McDonald attributed to an error on the part of the accounting department. McDonald said that it was also an error that the new system was

listed as a new benefit added during 1960 in the letter sent to the employees March 4, 1960.

The March 4 letter also stated that a new vacation system had been adopted during 1960 which would allow the employees to take an additional one and one-half days vacation. Before 1960 each employee was required to take his week of vacation during a regular pay week, beginning Friday morning and ending Thursday evening. The men were paid Friday for the preceding work week. At the end of 1959 the Company shifted the pay week forward one day to give the accounting department an extra day for making up the pay checks before distribution on Friday. The Company then decided to abandon the requirement that a worker's vacation week coincide with the pay week, which with the new pay week would have scheduled the vacations from Thursday to Wednesday, and to allow employees to take a calendar week vacation. The change gave the employee a week-end at each end of his vacation and allowed him to be away for a longer time, although it did not grant him any actual increase in his paid vacation. The Company asserted that it established this policy at the start of 1960 and that during February certain employees took vacations on the new basis. The March 4 letter was, however, the first general announcement to all the employees of this new policy.

I

The parties hotly dispute whether the birthday holiday, the holiday overtime pay, and the change in vacations represent an effort by Exchange Parts to influence the representation election by an increase in employee benefits just before the voting. The hearing examiner found that in 1955 Exchange Parts established its first paid holiday and announced that

it would add an additional paid holiday each year. In 1958 there were four paid holidays. Early in 1959 McDonald announced that another paid holiday would be granted as a floating holiday. November 4 and 5 he announced that the new 1959 holiday would be the day after Christmas and also stated that in 1960 a sixth holiday would be added. Since there was no evidence to indicate that the Company knew of the Union's organizational campaign at that time, these findings clearly negate any inference that the sixth holiday was added as a result of the representation election or in an attempt to influence its outcome. The trial examiner found, however, that the announcement of the holiday was timed to influence the election. He stated, "I see no reason why McDonald could not have followed custom and announced the holiday at the Christmas party, or at least informed the employees the birthday holiday was then under consideration." He also questioned why the announcement of the plan for the birthday was delayed until the February 25 party.

We are unable to accept the imputation of blame to the Company on this point. There is no basis for the examiner's finding that McDonald should have announced the 1960 holiday at the Christmas party, since McDonald already had made that announcement November 4 and 5. Nor is there any rational basis for the hearing examiner to conclude that McDonald was under an obligation to announce at the Christmas party that the birthday holiday was under consideration, under pain of an examiner and the Board concluding that such omission amounted to interference with union organization. On the contrary, it seems reasonable to us for the Company *not* to make an announcement about the birthday holiday that might stir up employee hopes and expectations until it had

determined that the holiday was economically feasible. Finally, we can see no adequate basis for attributing an improper motive to the delay in the announcement until February 25, in view of the finding that a January meeting was not possible because of the unavailability of the Pioneer Palace. Such speculations do not reach the dignity of findings. See *N.L.R.B.* v. *McGahey*, 5 Cir., 1956, 233 F. 2d 406.

The story takes a different turn when we come to the holiday overtime pay and the vacation period. In its March 4 letter the Company announced both of these as new benefits added in 1960. This letter by itself constitutes substantial evidence of the creation of these benefits. The only question Exchange Parts raises relates to the timing; the employer asserts that the new overtime pay was established in 1959. This assertion, to say the least, is not so overwhelming that it compels acceptance as a matter of law. One might well raise an eyebrow over the contention that both the accounting department and those responsible for drafting the March 4 letter would have made such errors, and that the errors would have gone unnoticed, if the Company really had established the increased overtime pay as a permanent policy July 4, 1959. The new vacation week system may not be of prime importance but is a significant fringe benefit. It is a rational inference from the record that the new system was introduced in 1960 and announced generally for the first time in the March 4 letter. This is not the whole story, however.

The list of benefits in the March 4 letter shows that Exchange Parts, over the years, increased employee benefits as a regular matter of course. This and the announcement in the November 4 letter that the Company was anxious to do more to increase employee

morale would have justified the fact-finder in concluding that the institution of new benefits was not caused by the pending representation election. On the other hand the hearing examiner could have believed that these new benefits were greater than they otherwise would have been. The Company's March 4 letter itself stated that the employee benefits were increased twenty per cent by the additions within the past year. The fact that these new benefits were announced just two weeks before the election in a letter urging the employees to vote against the Union indicates that the benefits were part of the Company effort to oppose the Union. An issue of fact was presented with substantial evidence on either side. In such a case the factual determinations fall to the hearing examiner and the Board, since the demeanor of the witnesses and subtle bits of evidence developed during the trial can be decisive. *Universal Camera Corp.* v. *N.L.R.B.*, 1951, 340 U.S. 474, 71 S. Ct. 456, 95 L. Ed. 456; *Washington, V. & M. C. Co.* v. *N.L.R.B.*, 1937, 301 U.S. 142, 57 S. Ct. 112, 81 L. Ed. 965. We therefore accept the hearing examiner's and the Board's finding that as to the holiday overtime pay and the vacation period Exchange Parts increased its employee benefits with an intent to influence the outcome of the representation election. This poses squarely the legal question whether such action necessarily constitutes an unfair labor practice as defined and prohibited by 29 U.S.C.A. § 158(a)(1).

The Board itself has said, "We do not mean that an employer is foreclosed from announcing or granting economic benefits during a union's organizational campaign or during the pendency of a Board-ordered election." Matter of Hudson Hosiery Co., 72 NLRB 1434 (1947). But the test stated in that decision is a fuzzy, subjective one: "What is unlawful under the

Act is the employer's granting or announcing such benefits (although determined upon bona fide) *for the purpose* of causing the employees to accept or reject a representative for collective bargaining." (The Board's emphasis.) Taking the other extreme, the Board has also said:

> "It is well settled that the test of interference, restraint, and coercion under Section 8(a)(1) of the Act does not turn on the employer's motive or on whether the coercion succeeded or failed. The test is whether the employer engaged in conduct which, it may reasonably be said, tends to interfere with the free exercise of employee rights under the Act. Applying this test, we find that by announcing its change in overtime policy during the course of the organization campaign among office employees, the Respondent violated Section 8(a)(1) of the Act." American Freightways, Inc., 124 NLRB 146 (1959).

See *N.L.R.B. v. Illinois Tool Works*, 7 Cir., 1946, 153 F. 2d 811, 814; *N.L.R.B.* v. *Ford Brothers*, 6 Cir. 1948, 170 F. 2d 735, 738. Here, the Board seems concerned solely with the *effect* of the timing of the announcement of the benefits. We find, from our study of the cases, that the courts do not accept any of these tests. The proper criterion is whether there is objective evidence of restraint or coercion, such as conditioning the benefits on the employees voting against the union or relinquishing rights of self-organization.

None of the cases we have examined presents as cleanly as this case the question of the right of an employer to grant benefits timed to achieve the persuasive effect that a union is unnecessary. Certain decisions hold the employer guilty of an unfair labor practice, but in all of these cases the increase in benefits was

one part of an overall program of interference and restraint by the employer. On the other hand, at least three decisions hold that the employer was justified in increasing benefits and that this did not constitute a Section 8(a)(1) violation; in these however there was definite evidence indicating that the employer would have made the increases in the absence of the pending election. A consideration of these cases sets the frame of reference for the question raised by the instant case.

In *Medo Photo Supply Corp.* v. *N.L.R.B.*, 1943, 321 U.S. 678, 686, 64 S. Ct. 830, 88 L. Ed. 1007 the Supreme Court laid down the principle that the "action of employees with respect to the choice of their bargaining agents may be induced by favors bestowed by the employer as well as by his threats or domination". That principle must be applied in context, however. In Medo the Court applied it to an employer who granted wage increases conditioned on the employees abandoning a labor union previously designated as their bargaining representative.

One of the early cases indicating that it is improper to confer benefits on the employees to encourage opposition to a union is *Western Cartridge Co.* v. *N.L.R.B.*, 7 Cir., 1943, 134 F. 2d 240, 244. There the court made the frequently quoted statement that "interference is no less interference because it is accomplished through allurements rather than coercion." Again the facts differ considerably from those of the instant case. The company had required each employee to sign an individual employment contract. It had also encouraged the establishment of a union that was unaffiliated with any larger union organization and that dealt with matters not covered by the individual employment contracts. When an A. F. of L. union attempted to win recognition in the plant the

company opposed it vigorously and urged its employees to stick with the unaffiliated union. The court held that the company dominated the unaffiliated union and that its open hostility to one union and support of another violated the unfettered freedom of choice that the Act intended for the employees to have. The "interference by allurements" in this case represented the support of a competing union rather than any benefit directly conferred on the employees, contrary to the Midwest Piping rule, 63 NLRB 1060 (1945). See *Local 483, Inter. Bro. of Boilermakers v. N.L.R.B.*, D.C. Cir., 1961, 288 F. 2d 166, *cert. denied*, 368 U.S. 832.

In *N.L.R.B. v. Crown Can Co.*, 8 Cir., 1943, 138 F. 2d 263, the employer warned his employees at a meeting that if they insisted on pushing the organization the plant would be closed. At the end of the meeting he said, "If it is a wage increase you want I will see what I can do about it." Four days later there was a general wage increase. The Board found that these actions illegally restrained and coerced the employees. In such a case coercion results from the squeeze in which the employees are placed. They are faced with a dilemma. If they reject the union they can retain their jobs and enjoy increased compensation; if they vote in a union they are threatened with losing the increased benefits and their jobs as well. The increase in benefits operates as a part of an overall scheme that puts substantial pressure on the employees and prevents them from exercizing a free choice as to whether they wish to establish a union.

N.L.R.B. v. West Coast Casket Co., 9 Cir., 1953, 205 F. 2d 902 closely resembles the Crown Can case. Here also the employer threatened that "if it went union, he would close the plant" and during the union's organization campaign announced new eco-

nomic benefits; it announced the new benefits to various employees while interrogating them about their union sympathies. Here, as in Crown Can, the combination of the employer's acts tended to present each employee with the choice that he could go along with the employer or with the union but that he could not receive benefits from the employer and also exercise his right to organize a union.

A bare promise of future benefits is distinguishable from actual establishment of benefits; in some cases it is a fair inference that the benefits are contingent on a rejection of the union. It is well established that an employer cannot offer wage increases conditioned on the employees withdrawing from or voting against a union. *Medo Photo Supply Corp.* v. *N.L.R.B.*, 1944 U.S. 678, 64 S. Ct. 830, 88 L. Ed. 1007; *Joy Silk Mills* v. *N.L.R.B.*, D.C. Cir., 1950, 185 F. 2d 732, *cert. denied*, 341 U.S. 915; *N.L.R.B.* v. *Bailey Co.*, 6 Cir. 1950, 180 F. 2d 278; *M. H. Ritzwoller Co.* v. *N.L.R.B.*, 7 Cir., 1940, 114 F. 2d 432.

A recent case, *N.L.R.B.* v. *Katz*, 1962, — U.S. —, — S. Ct. —, — L. Ed. 2d —, should also be mentioned briefly. In this decision the Supreme Court held that it was a violation of the duty to bargain collectively, imposed by Section 8(a)(5), for an employer, without consulting a union with which it was negotiating, to grant merit increases, wage increases, and announce a more generous sick-leave policy. There, however, the company was in the middle of bargaining negotiations and the changes were matters subject to mandatory bargaining. Such unilateral changes were a circumvention of the duty to negotiate "which frustrates the objectives of Section 8(a)(5) much as does a flat refusal".

Judge Thurman Arnold was one of the first to emphasize that an employer is not guilty of an unfair

labor practice "because he treated his employees well in order to forestall a union movement", or because he reminded them of that fact, claimed credit for it during a period of a union election, and even increased wages during an election period. *Peter J. Schweitzer, Inc. v. N.L.R.B.*, Ct. App. D.C., 1944, 144 F. 2d 520. In that case, just before an election, the employer sent a letter to the employees and during the election campaign put into effect a general wage increase. The letter implied, or might imply, reprisals or a denial of past benefits if the employees voted for the union. The Court therefore enforced the Board's cease and desist order but only "so far as it requires the petitioner to assure its employees that the benefits it is giving and the liberal labor policy it has adopted will not be changed because they vote for a union". The Court explained:

> "We cannot agree * * * that an increase in wages or an improvement in working conditions made during an election period is an unfair labor practice provided there is no suggestion that these benefits would be withdrawn if a union is organized. Such a principle would mean that it is the duty of an employer to refrain from benefiting his employees in order to make them more inclined to vote for a union."

The first case we have found in which a court declined to enforce an order of the Board and approved the grant of benefits during a union campaign was *N.L.R.B. v. W. T. Grant Co.*, 4 Cir., 1953, 208 F. 2d 710. In ruling that the wage increase was not improper the Court relied on uncontradicted testimony that the increase was not considered until the store manager learned that a rival store in the same block planned to raise its wage level and that W. T. Grant made a point of paying its employees as well as any

neighboring store. The Court stated, "Certainly it cannot be laid down as a governing rule that during a union campaign, management must deny to its employees increased advantages which in the absence of the campaign would be granted." Similarly, the Court in *N.L.R.B.* v. *Cleveland Trust Co.*, 6 Cir., 1954, 214 F. 2d 95, 100, held that it was not improper for the company to increase wages before a union election when the reasons for the increases did not relate to the election. A contrary principle "would mean that it is the duty of the employer to refrain from benefitting his employees in order to make them more inclined to vote for a union." This Court reached the same result in *N.L.R.B.* v. *The Newton Company*, 5 Cir., 1956, 236 F. 2d 438.

The statute under which the N.L.R.B. issued its cease and desist order, 29 U.S.C.A. § 158(a)(1), provides that it shall be an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title." Section 157 grants employees the right "to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." The terms "interfere with, restrain, or coerce" have closely overlapping meanings and connotations. We understand the three terms to encompass one general group of activities, rather than to set out three separate categories. Each term must therefore be construed with a view to the implications of the other terms. These words, especially "restrain" and "coerce" are strong ones, which carry a suggestion of force and compulsion. The pertinent dictionary meaning of "interfere" is "to come in collision; to clash; also, to be in opposition; to run at cross-pur-

poses * * * to enter into, or take a part in, the concerns of others; to intermeddle; interpose; intervene." "Restrain" is defined as meaning "to keep in check; to hold back from acting, proceeding, or advancing, either by physical or moral force, or by any interposing obstacle; to repress or suppress; to curb." The definition given for "coerce" is "to constrain or restrain by force, esp. by law or authority; to repress; curb." Webster's New International Dictionary (2d Ed. unabridged, 1958). The dictionary meanings coincide with the common meanings. We note that these terms stand in contrast to such terms as "persuade" or "induce" which would also describe conduct designed to influence the actions of another but by non-compulsive means.

This provision has been liberally construed. As the court stated in *Rapid Roller Co.* v. *N.L.R.B.*, 7 Cir., 1942, 126 F. 2d 452, 457, "it is not necessary to show duress but only interference, and it is not necessary that the interference shall be successful in preventing organization." The provision has been used to prohibit a multitude of sins: a threat by an employer that he would not rehire any employees who went out on strike, *Collins Baking Co.* v. *N.L.R.B.*, 5 Cir., 1951, 193 F. 2d 483; anti-union interrogation of employees and requests that they withdraw from the union, *N.L.R.B.* v. *Economy Furniture*, 5 Cir., 1960, 284 F. 2d 339; threats by employer that he would close down the plant before it would have a union and the discriminatory discharge of employees because of their union activities, *N.L.R.B.* v. *Ferguson*, 5 Cir., 1958, 257 F. 2d 88; constant surveillance of an employee after the employer has learned of his union activities, *N.L.R.B.* v. *Gate City Cotton Mills*, 5 Cir., 1948, 167 F. 2d 647, 649. All of these employer actions proscribed by the statute bear the identifying

feature of a threat or an act to punish the employees for their union activities. The statutory purpose is to protect the worker from such employer pressures and enable him to decide whether he wishes to join and support a union without the fear that his decision to do so will jeopardize his relations with his employer. Decision enjoining an employer from making a promise of benefits are consonant with this purpose, since such promises exert a similar pressure on the employees: they may exercise their union rights only by sacrificing employment benefits. The promise of a benefit for abstaining from union activities is a more moderate device than the threat of punishment for participating in union activities, but its operation is essentially the same.

The announcement of new benefits by Exchange Parts in the instant case differs tellingly from the actions prohibited by this wide range of cases. Here the benefits were put into effect unconditionally on a permanent basis, and no one has suggested that there was any implication the benefits would be withdrawn if the workers voted for the union. The employees were as free after the establishment of the new benefits as they were beforehand to vote for or against the union according to their own wishes, untrammelled by considerations of the impact their decision would have on their job security, compensation, or relations with the employer. Of course, we regard as vital the fact that the benefits were announced before the certification of the union as the bargaining agent of the employees. If, on the other hand, the employees had previously selected a union as their representative, as in *N.L.R.B.* v. *Katz*, the employer's unilateral changes would have been a serious interference with orderly procedure in the collective bargaining process.

The argument that an increase of benefits by the employer may persuade the employees not to vote for the union overlooks the fact that the employer is entitled to try to persuade his employees to vote against a union, provided that he does so by non-coercive means. "Anti-union bias, strong convictions against unions or opposition to the underlying philosophy of the Labor Management Relations Act is not itself an unfair labor practice. In a free democracy, it is the citizen, not the Government, who fixes his own beliefs." *N.L.R.B.* v. *McGahey*, 5 Cir., 1956, 233 F. 2d 406, 409. The right of the employer to make his appeal to the workers is expressly preserved by the statute. "The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this subchapter, if such expression contains no threat of reprisal or force or promise of benefit." 29 U.S.C.A. § 158(c). Although freedom to increase benefits in an effort to make a union seem unnecessary does not follow as a necessary incident of the right to argue against the union, it is scarcely any more coercive. Also, although the limitation on the expression of views to exclude a threat of reprisal or force or a promise of a benefit is not in terms an exclusive limitation, it is significant that this is where the authors of the provision chose to draw the line. The whole tenor of the statutory language and decisions interpreting it indicates that the evil to which the statute is directed is the use of force and pressure. Persuasive efforts are not outlawed. Testing the increase of benefits effected by Exchange Parts against these considerations, we feel that this action is persuasive, not coercive.

Practical considerations support this result. We would be reluctant to announce any sort of a rule

that inhibited employers from improving working conditions, increasing wages, and reducing hours of labor. Unlike most actions of interference or coercion, an increase in benefits operates to the advantage of workers. It would be ironic if a labor law had the result of discouraging benefits for labor. The problem is intensified by the fact that in many cases it would be difficult—if not impossible—to determine whether an increase of benefits is made to discourage unionization or for other "legitimate" reasons. Labor would stand to lose not only where an anti-union motivation actually existed but also in some cases where the employer for other reasons wished to increase benefits but feared being charged with an unfair labor practice. Extension of the statute's prohibitions to cover this sort of a case would thus act as a burden on both management and labor.

Summarizing, the critical fact in this case is that the benefits carried no coercive element; they were not conditioned upon the employees' relinquishment of any rights. The employees had, as the Act intended the employees to have, an unfettered right of self-organization, a free choice. It is impressive logomachy to turn "allurements" into "coercion" by divining a secret purpose. It is good, homey, country-lawyer advocacy to argue that a carrot on a stick may have the same effect on a donkey as a club. This is beguiling bewording. But a carrot is not a club. Labor is not a donkey. Persuasion is not coercion.[1]

Enforcement of the Board order is

Denied.

---

[1] In an analogous situation this Court held that even during bargaining negotiations an employer may engage in a lockout for the purposes of enhancing the acceptance of the company's terms rather than the union's terms. "A lockout may, under the facts of a particular case, amount to a violation of § 8(a)(1) or § 8(a)(3) or of § 8(a)(5) or all three * * * But un-

less the facts support a conclusion of a violation, then resort to a lockout may not be made a violation simply on the ground that this gives advantage to the employer * * *" NLRB v. Dalton Brick & Tile Corp., 5 Cir., 1962, — F. 2d — . The Supreme Court has said as to Section 8(a)(3): "Thus this section does not outlaw all encouragement or discouragement of membership in labor organizations; only such as is accomplished by discrimination is prohibited. Nor does this section outlaw discrimination in employment as such: only such discrimination as encourages or discourages membership in a labor organization is proscribed." Radio Officers' Union v. NLRB, 1954, 347 U.S. 17, 42, 43, 74 S. Ct. 323, 98 L. Ed. 455. Justice Harlan, concurring in a recent opinion, points out: "What in my view is wrong with the Board's position in these cases is that a mere showing of foreseeable encouragement of union status is not a sufficient basis for a finding of violation of the statute. It has long been recognized that an employer can make reasonable business decisions, unmotivated by an intent to discourage union membership or protected concerted activities, although the foreseeable effect of these decisions may be to discourage what the act protects. For example, an employer may discharge an employee because he is not performing his work adequately, whether or not the employee happens to be a union organizer. * * * Yet a Court could hardly reverse a Board finding that such firing would foreseeably tend to discourage union activity. Again, an employer can properly make the existence or amount of a year-end bonus depend upon the productivity of a unit of the plant, although this will foreseeably tend to discourage the protected activity of striking. * * * A union, too, is privileged to make decisions which are reasonably calculated to further the welfare of all the employees it represents, nonunion as well as union, even though a foreseeable result of the decision may be to discourage union membership." Local 357, International Brotherhood of Teamsters, etc. v. NLRB, — U.S. —, —, 6 L. Ed. 2d. 11.

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 19106

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

EXCHANGE PARTS COMPANY, RESPONDENT

DECREE

Before RIVES, BROWN, and WISDOM, *Circuit Judges.*

By the COURT:

THIS CAUSE came on to be heard upon the petition of the National Labor Relations Board for the enforcement of a certain order issued by it against the aforesaid Respondent on May 26, 1961. The Court heard argument of respective counsel on January 30, 1962, and has considered the briefs and transcript of record filed in this cause. On June 22, 1962, the Court being fully advised in the premises, handed down its decision denying Board's petition for enforcement of its order.

ON CONSIDERATION WHEREOF, it is ordered, adjudged and decreed by the United States Court of Appeals for the Fifth Circuit that enforcement of the said order of the National Labor Relations Board directed against Exchange Parts Company, its officers, agents, successors and assigns, be and it hereby is denied.

Entered: July 23, 1962 (Original Filing Date).

Decree: Filed and Entered July 23, 1962.

U.S. GOVERNMENT PRINTING OFFICE: 1962

INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statute involved	2
Statement	2
I. The Board's findings of fact	2
II. The Board's conclusions and order	5
III. The decision of the Court of Appeals	6
Summary of argument	7
Argument	8
An employer violates Section 8(a)(1) of the National Labor Relations Act if he grants economic benefits to his employees for the purpose of inducing them to reject the union in a forthcoming representation election	8
A. Section 8(a)(1) may be violated by inducements as well as by conditional promises, threats or force	8
B. An antiunion purpose impeaches conduct which might otherwise be justified by legitimate business considerations	12
C. Section 8(c) does not permit an employer to use economic power to "persuade" his employees to reject a union	16
Conclusion	18
Appendix	19

706-921—63——1

CITATIONS

Cases:

	Page
American Freightways, Inc., 124 NLRB 146	15
Bata Shoe Co., 116 NLRB 1239	14
Bonwit Teller, Inc. v. *National Labor Relations Board*, 197 F. 2d 640, certiorari denied, 345 U.S. 905	15
Burns Brick Co., 80 NLRB 389	14
Campbell & McLean, Inc., 106 NLRB 1049	15
Hudson Hosiery Co., 72 NLRB 1434	14
Indiana Metal Products Corp. v. *National Labor Relations Board*, 202 F. 2d 613	9, 11
Jackson Tile Mfg. Co., 122 NLRB 764	15
Joy Silk Mills, Inc. v. *National Labor Relations Board*, 185 F. 2d 732, certiorari denied, 341 U.S. 914	9, 12
Lowell Sun Publishing Co., 136 NLRB 206	14
May Department Stores Co. v. *National Labor Relations Board*, 326 U.S. 376	14
Medo Photo Supply Corp. v. *National Labor Relations Board*, 321 U.S. 678	8, 9
National Labor Relations Board v. *Bailey Co.*, 180 F. 2d 278	9
National Labor Relations Board v. *Bradley Lumber Co.*, 128 F. 2d 768	9
National Labor Relations Board v. *Cen-Tennial Cotton Gin Co.*, 193 F. 2d 502	9
National Labor Relations Board v. *Cleveland Trust Co.*, 214 F. 2d 95	15
National Labor Relations Board v. *Columbia Products Corp.*, 141 F. 2d 687	14
National Labor Relations Board v. *Crown Can Co.*, 138 F. 2d 263, certiorari denied, 321 U.S. 769	9, 12
National Labor Relations Board v. *Erie Resistor Corp.*, 373 U.S. 221	8, 12, 13, 15

Cases—Continued

	Page
National Labor Relations Board v. *James Thompson & Company*, 208 F. 2d 743	9
National Labor Relations Board v. *Jamestown Sterling Corp.*, 211 F. 2d 725	9
National Labor Relations Board v. *Jones & Laughlin Steel Co.*, 301 U.S. 1	16
National Labor Relations Board v. *Lowell Sun Publishing Co.*, decided June 11, 1963, 53 LRRM 2480	9
National Labor Relations Board v. *Pyne Molding Corp.*, 226 F. 2d 818	9, 12
National Labor Relations Board v. *Radcliffe*, 211 F. 2d 309	9
National Labor Relations Board v. *The Newton Co.*, 236 F. 2d 438	15
National Labor Relations Board v. *Valley Broadcasting Co.*, 189 F. 2d 582	9
National Labor Relations Board v. *West Coast Casket Co.*, 205 F. 2d 902	9, 12
National Labor Relations Board v. *Williamson-Dickie Manufacturing Co.*, 130 F. 2d 260	9
National Labor Relations Board v. *W. T. Grant Co.*, 208 F. 2d 710	15
Peter J. Schweitzer, Inc. v. *National Labor Relations Board*, 144 F. 2d 520	12
Pyne Moulding Corp., 110 NLRB 1700	14
Reeves Instrument Corp., 104 NLRB 610	14
Republic Aviation Corp. v. *National Labor Relations Board*, 324 U.S. 793	10, 14
Standard Oil Products, Inc., 99 NLRB 899	14
True Temper Corp., 127 NLRB 839	15
W. C. Nabors Co., 89 NLRB 538	14
Western Cartridge Co. v. *National Labor Relations Board*, 134 F. 2d 240	10
Willard's Shop Rite Markets, 132 NLRB 1146	14

Statute:

National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*)

	Page
Section 1	9
Section 7	9, 19
Section 8(a)(1)	5, 6, 7, 8, 9, 10, 14, 15, 16, 17, 19
Section 8(c)	8, 16, 17, 19

In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 26

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

EXCHANGE PARTS COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

OPINIONS BELOW

The opinion of the court of appeals (R. 115–129) is reported at 304 F. 2d 368. The Board's decision and order (R. 52–54) are reported at 131 NLRB 806.

JURISDICTION

The judgment of the court of appeals was entered on July 23, 1962 (R. 130). The petition for a writ of certiorari was filed on October 18, 1962, and was granted on May 27, 1963 (R. 131). The jurisdiction of this Court rests on 28 U.S.C. 1254(1) and Section 10(e) of the National Labor Relations Act, as amended, 29 U.S.C. 160(e).

QUESTION PRESENTED

Whether an employer violates Section 8(a)(1) of the National Labor Relations Act by granting economic benefits to its employees, during the course of a union organizational campaign and immediately prior to a Board-ordered representation election, for the purpose of inducing the employees to reject the union in the election.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. 151, *et seq.*), are set forth in the Appendix, *infra*, p. 19.

STATEMENT

I. THE BOARD'S FINDINGS OF FACT

The respondent (also known as "EPCO") is a Texas corporation which is engaged in the rebuilding of automobile parts (R. 21; 11, 14). Its main office and place of business is at Fort Worth, Texas, where the events here in issue occurred (R. 21; 11, 14).

EPCO's employees were not represented by any collective bargaining agent before October 1959. On or about October 26, 1959, the International Brotherhood of Boilermakers, Iron Shipbuilders, Blacksmiths, Forgers and Helpers, AFL–CIO, began an organizational campaign in EPCO's plant (R. 88–89). On November 9, the union wrote a letter to EPCO's president in which it informed EPCO that a majority of its employees had designated the union to represent them in contract negotiations (R. 22; 99–100). Although EPCO concededly received the letter, there is no evidence that it made any reply. On November 16,

the union filed a representation petition with the National Labor Relations Board, and the Board, after holding a hearing, directed on February 19, 1960, that an election be held (R. 22; 57). March 18, 1960, was set as the date for the election.

On February 25, 1960, EPCO sponsored an employee dinner at the Pioneer Palace, a public building in Fort Worth (R. 23; 76). At the dinner the employees were permitted to vote on whether an additional holiday which had previously been promised to them should be arranged so as to permit each employee to take it on his birthday (R. 23; 59).[1] EPCO's vice-president also spoke to the assembled employees about the forthcoming Board election. He told them that in its organizing campaign the union had "twisted" the facts concerning benefits which management had conferred, and that they

[1] This was a change in EPCOs' usual holiday policy inasmuch as it was the first time that the employees were permitted to decide when their holiday would fall (R. 23; 89). In 1955 EPCO had established its first paid holiday and announced that an additional holiday would be added each year thereafter. Consequently, there were four paid holidays in 1958. Early in 1959 EPCO announced that the additional 1959 holiday would be a "floating" one, *i.e.*, it would be scheduled for a day following an existing holiday. The holiday was subsequently scheduled for the day after Christmas. At the time EPCO's vice-president also informed the employees that the additional 1960 holiday would also be a "floating" one. No further notice regarding the date of this holiday was given before the dinner of February 25. The Board found that the timing of the birthday holiday announcement was intentionally arranged so as to influence the outcome of the election (R. 26). The court of appeals held the evidence insufficient to support this finding (R. 118–119), and the correctness of its ruling in this regard is not in issue here.

would decide by their vote whether they "wished to hand over their rights to speak and act for themselves" (R. 23; 60).

On March 4, 1960, two weeks before the Board election was to be held, EPCO sent its employees a letter disparaging the union's "empty promises," and asserting that it would not "take a union to get additional improvements in the future" (R. 90–91). Accompanying the letter was a pamphlet which, *inter alia*, announced two other changes in working conditions under the heading of "BENEFITS AT EPCO" which had been "added or increased" in 1960:[1] (1) With a single exception (a July 4 holiday which, in 1959, had fallen on a Saturday) paid holidays had not previously been counted as working time in computing weekly overtime pay. Under the newly announced system, paid holiday time was to be considered time worked for the purpose of computing weekly overtime for any employee who was at work on the day preceding the holiday and on the day following.[2] (2) A revision in the regula-

[1] The full text of the letter and accompanying pamphlet appears at pp. 90–96 of the Record. The references to the 1960 benefits are set out at pp. 94–95 of the Record.

[2] The pamphlet announced that this change "will mean $5.00 to $6.00 more per employee per holiday." EPCO's employees were ordinarily paid for their 49½-hour workweek at a 40-hour-a-week base pay and at overtime rates for the additional 9½ hours (R. 114). Under the prior system, the 9 hours of the ordinary paid holiday were treated at regular rates, with the result that in a holiday week employees were being paid for 49 hours at regular rates and for only ½ hour at the overtime scale (R. 61). On this basis the gross pay on an average paycheck represented by Respondent's Exhibit 11 (R. 114) for a holiday week would come to $62.19 instead of $67.81.

tions concerning the one-week vacation allotted to the employees permitted employees to sandwich their vacations between two weekends. This gave them an additional one-and-a-half days for extended vacation trips.[4]

On March 18, 1960, the Board election was held, and the Union lost by a vote of 121 to 94 (R. 22; 17).

II. THE BOARD'S CONCLUSIONS AND ORDER

On the foregoing facts, the Board found that EPCO had announced and granted increased overtime and vacation benefits shortly before the representation election for the purpose of inducing its employees to reject the union. Accordingly, the Board concluded that the Company had interfered with and restrained the employees in the exercise of their organizational rights, in violation of Section 8(a)(1) of the Act (R. 27–28, 52). The Board's order directed EPCO to

[4] EPCO operated on a 5½ day week, including a half a day on Saturday. Prior to the Union campaign, the vacation week ran from Friday through Thursday with only one week-end in between. Under the new plan, vacations could begin on a Monday so that an employee taking a week's vacation would leave work at noon on Saturday and return a week from the following Monday. By having an extra week-end of leave, his vacation was "extended" by 1½ days (R. 60–62, 81).

Before the Board and the court of appeals, EPCO contended that the new overtime pay basis was in fact decided upon in 1959, but that, due to an error in the accounting department, it had not been fully effectuated; hence the March 4 pamphlet was in error in listing it as a new benefit for 1960 (R. 61, 85–86). Similarly, EPCO contended that increase in vacation period merely flowed from a change in the workweek which had been announced in January 1960 (R. 62, 79–81). The Board found both of these contentions to be without merit (R. 26–27) and the court of appeals did not overturn this finding (R. 119–120).

cease and desist from the unfair labor practices found and from any like or related illegal conduct, and required it to post appropriate notices (R. 52–53).[4]

III. THE DECISION OF THE COURT OF APPEALS

The court of appeals denied enforcement of the Board's order. It agreed that there was substantial evidence in the record as a whole to support the Board's finding that EPCO had introduced and announced the increased overtime and vacation benefits on March 4, 1960 as part of its "effort to oppose the Union" and "with an intent to influence the outcome of the representation election" which was just two weeks away (R. 120). Nonetheless, the court held that granting the benefits did not violate Section 8(a)(1) of the Act because there was no "objective evidence of restraint or coercion, such as conditioning the benefits on the employees voting against the union or relinquishing rights of self-organization" (R. 121). The court construed the words "interfere with, restrain, or coerce" in Section 8(a)(1) as confined to 'the use of force and pressure" and as not intended to reach mere "[p]ersuasive efforts" (R. 128). Since EPCO's benefits "were

[4] The examiner also found that the timing of the birthday holiday announcement was intentionally arranged so as to influence the election, and the Board agreed. (See note 1, pp. 3–4, *supra*.) (The court of appeals rejected this finding, and its ruling on this point was not questioned in the petition for certiorari.) In addition, the examiner found that the company's action had interfered with the election, and he recommended that the election be set aside (R. 28, 31). The Board did not consider this question since the Union withdrew its representation petition before the case went to the Board (R. 52, n. 1; 51, 35).

put into effect unconditionally on a permanent basis * * * [without] any implication the benefits would be withdrawn if the workers voted for the union," the court concluded that they did not "coerce" the employees, but only "persuade[d]" them to vote against the Union (R. 126–127).

SUMMARY OF ARGUMENT

A. The dominant purpose of Section 8(a)(1) of the National Labor Relations Act is to protect employees' "rights to self-organization" from interference by employers. The conduct forbidden by this provision is not limited, as the court of appeals assumed, to "the use of force and pressure." For an employer is able to undermine a union's organizational effort as effectively by inducement as by threat. And just as a promise of benefit is a prohibited form of inducement if it is conditioned upon the employees' rejection of the union, so is the actual conferral of a benefit prohibited if, in the context of the surrounding circumstances, it demonstrates that the employer will deal more favorably with the employees if they defeat the union.

B. This is not to say that all improvements in conditions of employment which are instituted at or about the time of a representation election or during an organizing campaign necessarily constitute unfair labor practices. If the employer is motivated by a legitimate business purpose, his conferral of benefits upon his employees is not prohibited by Section 8(a)(1), even though its incidental effect may be to discourage union membership. Only if it is the employer's purpose to discourage such membership

is the "claim of legitimacy * * * totally dispelled," *National Labor Relations Board* v. *Erie Resistor Corp.*, 373 U.S. 221, 228, so that conduct which is otherwise permissible becomes an unfair labor practice.

C. Section 8(c) has no application here. It is intended to preserve for employers and unions the right to express their views and disseminate them to the employees. It is not a license for employers to resort to economic power which only they possess and to which the union cannot effectively respond.

ARGUMENT

AN EMPLOYER VIOLATES SECTION 8(a)(1) OF THE NATIONAL LABOR RELATIONS ACT IF HE GRANTS ECONOMIC BENEFITS TO HIS EMPLOYEES FOR THE PURPOSE OF INDUCING THEM TO REJECT THE UNION IN A FORTHCOMING REPRESENTATION ELECTION

A. SECTION 8(a)(1) MAY BE VIOLATED BY INDUCEMENTS AS WELL AS BY CONDITIONAL PROMISES, THREATS OR FORCE

Section 8(a)(1) of the Act makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of" the right of self-organization. Ever since *Medo Photo Supply Corp.* v. *National Labor Relations Board*, 321 U.S. 678, it has been well-established that an employer violates Section 8(a)(1) if he grants economic benefits to his employees in exchange for their agreement to abandon or reject the union. In that case the Court held it to be a separate unfair labor practice for an employer, "in response to the offer of its employees, to induce them by the grant of wage increases, to leave the union," 321 U.S. at 685. This

conclusion, based upon the premise that the "action of employees with respect to the choice of their bargaining agents may be induced by favors bestowed by the employer as well as by his threats or domination" (*id.* at 686), has been consistently followed.*

The reason for the rule is apparent. Section 7 guarantees to employees the right "to self-organization" and "to form, join, or assist labor organizations." Section 8(a)(1) implements this guarantee by prohibiting interference, restraint or coercion on the part of employers. Both of these provisions must be considered in light of the Act's policy, set out in Section 1, to protect "the exercise by workers of full freedom of association, self-organization, and designa-

---

* See, *e.g.*, *National Labor Relations Board* v. *Lowell Sun Publishing Co.*, decided June 11, 1963 (C.A. 1), 53 LRRM 2480, 2482-2483; *National Labor Relations Board* v. *Pyne Molding Corp.*, 226 F. 2d 818, 820 (C.A. 2); *National Labor Relations Board* v. *Jamestown Sterling Corp.*, 211 F. 2d 725, 726 (C.A. 2); *National Labor Relations Board* v. *James Thompson & Company*, 208 F. 2d 743, 748 (C.A. 2); *National Labor Relations Board* v. *Cen-Tennial Cotton Gin Co.*, 193 F. 2d 502, 503 (C.A. 5); *National Labor Relations Board* v. *Williamson-Dickie Manufacturing Co.*, 130 F. 2d 260, 262 (C.A. 5); *National Labor Relations Board* v. *Bailey Co.*, 180 F. 2d 278 (C.A. 6); *National Labor Relations Board* v. *Valley Broadcasting Co.*, 189 F. 2d 582, 586 (C.A. 6); *Indiana Metal Products Corp.* v. *National Labor Relations Board*, 202 F. 2d 613, 620 (C.A. 7); *National Labor Relations Board* v. *Crown Can Co.*, 138 F. 2d 263, 266 (C.A. 8), certiorari denied, 321 U.S. 769; *National Labor Relations Board* v. *Bradley Lumber Co.*, 128 F. 2d 768, 770-771 (C.A. 8); *National Labor Relations Board* v. *West Coast Casket Co.*, 205 F. 2d 902, 905 (C.A. 9); *National Labor Relations Board* v. *Radcliffe*, 211 F. 2d 309, 311, 315-316 (C.A. 9); *Joy Silk Mills, Inc.* v. *National Labor Relations Board*, 185 F. 2d 732, 739, 740-741 (C.A.D.C.), certiorari denied, 341 U.S. 914.

tion of representatives of their own choosing." Hence it follows, as this Court noted in *Republic Aviation Corp.* v. *National Labor Relations Board*, 324 U.S. 793, 798, that the "dominant purpose" of Section 8(a)(1) is to insure "the right of employees to organize for mutual aid without employer interference."

The guarantee against "employer interference" is breached when an employer promises economic benefits in exchange for the employees' rejection of a bargaining agent. For the employer is then using his economic power coercively in the same manner as one might use threats of force or of economic sanctions. Employees who are told that they will receive wage increases or other improved working conditions if they vote against the union are no longer realistically able to weigh only the intrinsic merits of collective bargaining and representation by the union or unions who seek certification; an element of substantial immediate importance but of minimal long-range significance has unfairly tipped the scales in favor of the employer. Consequently, Section 8(a)(1) is violated by an employer's conditional promise. "[I]nterference is no less interference because it is accomplished through allurements rather than coercion." *Western Cartridge Co.* v. *National Labor Relations Board*, 134 F. 2d 240, 244 (C.A. 7).

Although the court of appeals recognized that an employer's promise to confer benefits upon his employees if they rejected the union would be an unfair labor practice, it distinguished the present case on the ground that economic benefits were actually granted and not merely promised. It was the court's view

that, if benefits are "put into effect unconditionally on a permanent basis," the employees' choice whether or not to vote for the union remains "untrammelled by considerations of the impact their decision would have on their job security, compensation, or relations with the employer" (R. 127). The court accordingly concluded that EPCO had engaged in a course of conduct that was "persuasive, not coercive."

The court's reasoning is based on the mistaken premise that an employer's grant of benefits must expressly be made conditional upon rejection of the union in order to discourage employee support of the proposed bargaining agent. In fact, however, if an employer announces or grants economic benefits in a context that makes apparent his purpose of defeating organization, employees are likely to infer that he is demonstrating, by resort to economic power which he alone possesses, that the defeat of the union will produce more substantial benefits than collective bargaining. The implication was obvious in the present case, for the letter accompanying the pamphlet in which the new vacation and overtime plans were announced stated, "The Union can't put any of those things in your envelope—*only the Company can do that,*" and "[I]t won't take a Union to get additional improvements in the future" (R. 90). The employees were told, in effect, that the continued accumulation of economic benefits hinged upon the defeat of the union, notwithstanding the employer's failure to make any explicit threat or promise. Hence, as the Seventh Circuit observed in *Indiana Metal Products Corp.* v. *National Labor Relations Board,*

202 F. 2d 613, 620, it was irrelevant that "no strings were attached to the offer and no threats [were made] to withdraw the benefits if the employees persisted in supporting the union." See also *National Labor Relations Board* v. *Pyne Molding Corp.*, 226 F. 2d 818, 820 (C.A. 2); *National Labor Relations Board* v. *Crown Can Co.*, 138 F. 2d 263, 266 (C.A. 8), certiorari denied, 321 U.S. 769; *National Labor Relations Board* v. *West Coast Casket Co.*, 205 F. 2d 902, 905 (C.A. 9).[1]

B. AN ANTIUNION PURPOSE IMPEACHES CONDUCT WHICH MIGHT OTHERWISE BE JUSTIFIED BY LEGITIMATE BUSINESS CONSIDERATIONS

In *National Labor Relations Board* v. *Erie Resistor Corp.*, 373 U.S. 221, 227–228, decided last Term, this Court observed:

> When specific evidence of a subjective intent to discriminate or to encourage or discourage union membership is shown, and found, many otherwise innocent or ambiguous actions which are normally incident to the conduct of a business may, without more, be converted into unfair labor practices * * * Such proof itself is normally sufficient to destroy the employer's claim of a legitimate business purpose, if one is made, and provides strong support to a finding that there is interference with union rights or that union membership will be discouraged.

[1] To the extent that the opinion in *Peter J. Schweitzer, Inc.* v. *National Labor Relations Board*, 144 F. 2d 520, 524 (C.A.D.C.), may support the view of the court below, it is our position that the correct principle was stated by Judge Edgerton in his dissenting opinion in that case (144 F. 2d at 526–527), and that the District of Columbia Circuit has subsequently applied it in *Joy Silk Mills* case, note 6, *supra*.

> Conduct which on its face appears to serve legitimate business ends in these cases is wholly impeached by the showing of an intent to encroach upon protected rights. The employer's claim of legitimacy is totally dispelled.

The same general principle is applicable to benefits which are conferred during an organizational compaign and shortly before the certification election. An employer is ordinarily free during such a campaign to increase wages or otherwise to institute improved conditions of employment if the changes are prompted by legitimate business considerations.[8] Such conduct may, under a strictly literal interpretation of Section 8(a)(1), be said to "interfere" with the employees' rights of self-organization, at least to the extent that they obviate some of the conditions which originally impelled the employees to seek collective bargaining. But the "interference" will have little tendency to restrain or coerce the employees' free choice. For, if it is apparent to the employees that there is a legitimate business purpose for the employer's action, they are not likely to consider the benefits conferred as something which could only be gained and retained if there were no union.[9] What

[8] Certain kinds of changes, however, may be inherently discriminatory or so destructive of the rights guaranteed by the Act that they would be prohibited irrespective of the employer's motives. See *National Labor Relations Board* v. *Erie Resistor Corp.*, *supra*. The benefits in the present case were not of that nature.

[9] Moreover, even if a grant of benefits in these circumstances could be thought to restrain or coerce the employees, a privilege is accorded the employer to inflict this "injury" in the interest of accommodating his legitimate interest in running his busi-

little interference remains is justified by the employer's interest in the normal operation of his business.

But if an employer does as EPCO did in the present case and manifests a clear purpose of "minimiz[ing] the influence of organized bargaining * * * [and] interfer[ing] with the right of self-organization by emphasizing to the employees that there is no necessity for a collective bargaining agent" (*May Department Stores Co.* v. *National Labor Relations Board*, 326 U.S. 376, 385), the economic benefits which he grants in order to make his demonstration effective are prohibited by Section 8(a)(1). The impact of this kind of demonstration, taken together with the implications arising from the employer's motive, is coercive, and its effect is substantially to discourage the employees from voting for the union.

This distinction was clearly stated by the Board in *Hudson Hosiery Co.*, 72 NLRB 1434, 1437, and has been consistently followed:[10]

---

ness. See *Republic Aviation Corp.* v. *National Labor Relations Board*, 324 U.S. 793, 798. But this immunity exists only if the employer acts for the purpose for which the privilege was given. Hence, where, as here, his motive is antiunion, the privilege will not protect him. This is not a special rule applicable to labor cases; it accords with the general law of torts. See *National Labor Relations Board* v. *Columbia Products Corp.*, 141 F. 2d 687, 688 (C.A. 2).

[10] For Board decisions in which the economic benefits were found to be motivated by antiunion considerations, see *Standard Coil Products, Inc.*, 99 NLRB 899; *Reeves Instrument Corp.*, 104 NLRB 610; *Pyne Moulding Corp.*, 110 NLRB 1700; *Bata Shoe Co.*, 116 NLRB 1239; *Willard's Shop Rite Markets*, 132 NLRB 1146; *Lowell Sun Publishing Co.*, 136 NLRB 206.

For Board decisions in which the economic benefits were found to be motivated by business considerations, see *Burns Brick Co.*, 80 NLRB 389; *W. C. Nabors Co.*, 89 NLRB 538;

> [W]e do not mean that an employer is foreclosed from announcing or granting economic benefits during a union's organizational campaign or during the pendency of a Board ordered election. What is unlawful under the Act is the employer's granting or announcing such benefits * * * *for the purpose* of causing the employees to accept or reject a representative for collective bargaining.

In the present case there was substantial evidence, as the court of appeals recognized (R. 120), to sustain the Board's finding that EPCO's announcement of overtime and vacation benefits was intentionally timed to induce the employees to reject the union. Consequently, even if the particular benefits might otherwise have been warranted for business reasons, they were "wholly impeached" by EPCO's antiunion motive, which also provided "strong support" for the finding that interference with the employees' rights had resulted. *National Labor Relations Board* v. *Erie Resistor Corp.*, 373 U.S. 221, 228.

Campbell & McLean, Inc., 106 NLRB 1049; *Jackson Tile Mfg. Co.*, 122 NLRB 764; *True Temper Corp.*, 127 NLRB 839, 843–844. Although there is language in *American Freightways, Inc.*, 124 NLRB 146, which suggests that motive may be irrelevant, the later decisions, *supra*, negate that suggestion. See, in particular, the discussion of *American Freightways* in *True Temper, supra.*

For court of appeals cases holding that a promise or grant of economic benefits was motivated by business considerations and thus was not violative of Section 8(a)(1), see *National Labor Relations Board* v. *W. T. Grant Co.*, 208 F. 2d 710, 712 (C.A. 4); *National Labor Relations Board* v. *Cleveland Trust Co.*, 214 F. 2d 95, 98–100 (C.A. 6); *Bonwit Teller, Inc.* v. *National Labor Relations Board*, 197 F. 2d 640, 644–646 (C.A. 2), certiorari denied, 345 U.S. 905; *National Labor Relations Board* v. *The Newton Co.*, 236 F. 2d 438, 446 (C.A. 5).

Finally, there is no basis for the fear of the court of appeals that, if EPCO's acts were held to violate Section 8(a)(1), employers might be inhibited "from improving working conditions, increasing wages, and reducing hours of labor" (R. 128). Whenever motive determines the legality of conduct, the actor runs the risk that his motive will be subject to scrutiny; but the burden of proving that the employer has acted unlawfully rests upon the General Counsel. The employer has full opportunity before the examiner and the Board, and then in the court of appeals, to contest the sufficiency of the evidence against him. His position is no different from that of an employer who is charged with violating Section 8(a)(3) by discharging an employee on account of union activity. The fact that motive is an issue is no reason for refusing to give effect to the Act. See *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1, 45–46.

C. SECTION 8(C) DOES NOT PERMIT AN EMPLOYER TO USE HIS ECONOMIC POWER TO "PERSUADE" HIS EMPLOYEES TO REJECT A UNION

The court of appeals buttressed its construction of Section 8(a)(1) by relying upon Section 8(c) which, it said, preserves to employers the right to use "persuasive efforts" to defeat a union. The court reasoned that, if employers were permitted to confer economic benefits upon their employees to induce them to reject a union, no greater coercion would be possible than results from the employers' expressly protected right "to argue against the union" (R. 128).

The court concluded that, since Section 8(c) excepted all speech but promises and threats from the prohibition of Section 8(a)(1), it also authorized economic inducements.

Section 8(c), however, protects only "the expressing of any views, argument, or opinion, or the dissemination thereof." Neither its language nor its purpose embraces the exercise of economic power by an employer or a union. EPCO's act of instituting a new vacation schedule or authorizing increased pay for holidays was obviously not the expression of a view, argument or opinion. And when Congress fully guaranteed the rights of the employer and the union to air their views, it was dealing with the sort of conduct as to which neither side possesses any inherent advantages and which could, through the free exchange of ideas, be helpful in resolving the merits of an individual employee's voting choice. But if Section 8(c) were construed to extend beyond speech and to protect the "persuasive" use of economic power, it would give the employer the upper hand. Such a construction would not only be protecting conduct that is of no assistance whatever in resolving the legitimate issues raised in a representation election, but it would subject the employees' votes to the pressures of an employer's veiled suggestions of economic reprisal or benefit. A proper construction of the language of Section 8(c) in light of its purpose cannot, therefore, result in its extension to "persuasion" which is accomplished not with rhetoric, but with cash or other economic benefits.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed and the cause remanded with instructions to enter a decree enforcing the order of the Board.

Respectfully submitted,

ARCHIBALD COX,
Solicitor General.

ARNOLD ORDMAN,
General Counsel,
DOMINICK L. MANOLI,
Associate General Counsel,
NORTON J. COME,
Assistant General Counsel,
MARION L. GRIFFIN,
Attorney, National Labor Relations Board.

SEPTEMBER 1963.

APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*).

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

SEC. 8(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * * *

(c) The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit.

* * * * *

U.S. GOVERNMENT PRINTING OFFICE: 1966

LIBRARY
SUPREME COURT, U.S.

Office-Supreme Court, U.S.
FILED
OCT 31 1963
JOHN F. DAVIS, CLERK

No. 26

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963

NATIONAL LABOR RELATIONS BOARD, *Petitioner*

v.

EXCHANGE PARTS COMPANY, *Respondent*

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

Brief For Respondent

JEAN ALLARD
Chicago, Illinois
HAROLD R. MUELLER
KARL H. MUELLER
Fort Worth, Texas
Attorneys for Respondent

JEAN ALLARD
Marmont Corporation
168 North Michigan Ave.
Chicago 1, Illinois
MUELLER & MUELLER
Burk Burnett Building
Fort Worth, Texas
Of Counsel

Fort Worth Brief Printing Co., 610 E. Jamison Street Phone ED 2-4970

INDEX

Page

Opinion Below 1

Question Presented 1

Statement 2

I. Proceedings Before the Board 2

II. The Facts 5

A. Background 5

B. The change in the time for taking vacations 6

C. Restoration and reiteration of overtime policy 8

D. The pre-election campaign 9

III. The Decision of the Court of Appeals 11

Summary of Argument 12

Argument 13

Conclusion 29

AUTHORITIES CITED

Cases: Page

Bonwit Teller, Inc. v. N.L.R.B., 197 F. 2d 640 (C.A. 2; 1952) cert. den. 345 U.S. 905 17

Collins Baking Co. v. N.L.R.B., 193 F 2d 483 (C.A. 5; 1951) 25

Indiana Metal Products Corp. v. N.L.R.B., 202 L ed 613 (C.A. 7; 1953) 16

Joy Silk Mills v. N.L.R.B., 185 F 2d 732 (C.A.D.C.; 1950) Cert. Den., 341 U.S. 915 16

May Department Stores Co. v. N.L.R.B., 326 U.S. 376, 90 L ed 145, 66 S. Ct. 203 ..... 16, 27, 28

Medo Photo Supply Corp. v. National Labor Relations Board, 321 U.S. 678, 88 L ed 1007 (1944) 15

N.L.R.B. v. Bailey Co., 180 F 2d 278 (C.A. 6; 1950) 16, 25

N.L.R.B. v. Cleveland Trust Co., 214 F 2d 95 (C.A. 6; 1954) 17

N.L.R.B. v. Crompton-Highland Mills, Inc., 337 U.S. 217, 93 L ed 1320, 69 S. Ct. 960 16

N.L.R.B. v. Crown Can Co., 138 F 2d 263 (C.A. 8; 1943) 16

N.L.R.B. v. Economy Furniture Co., 284 F 2d 339 (C.A. 5; 1960) 25

N.L.R.B. v. Erie Resistor Corp., 373 U.S. 221, 10 L ed 2d 308 (1963) 17

N.L.R.B. v. Ferguson, 257 F 2d 88 (C.A. 5; 1958) 25

N.L.R.B. v. Gate City Cotton Mills, 167 F 2d 647 (C.A. 5; 1948) 16, 25

N.L.R.B. v. W. T. Grant Co., 208 F 2d 710 (C.A. 4; 1953) 17

N.L.R.B. v. Katz, ... U.S. ...., 8 L ed 2d 230 (1962) 16

N.L.R.B. v. Lowell Sun Publishing Co., 320 F 2d 835 (C.A. 1; 1963) 16

N.L.R.B. v. The Newton Co., 236 F 2d 438 (C.A. 5; 1956) 17

N.L.R.B. v. Pyne Molding Corp., 226 F 2d 818 (C.A. 2; 1955) 16

N.L.R.B. v. West Coast Casket Co., 205 F 2d 902 (C.A. 9; 1953) 16

Rapid Roller Co. v. N.L.R.B., 126 F 2d 452 (C.A. 7; 1942) 25

Republic Aviation Corp. v. National Labor Relations Board, 324 U.S. 793, 798 20

AUTHORITIES CITED (Continued)

Cases: Page

M. H. Ritzwoller Co. v. N.L.R.B., 114 F 2d 432 (C.A. 7; 1940) 16

Peter J. Schweitzer, Inc. v. N.L.R.B., 144 F 2d 520 (C.A. D.C.; 1944) 27

Western Cartridge Co. v. N.L.R.B., 134 F 2d 240 (C.A. 7; 1943) 25, 26

Board Decisions:

American Freightways, Inc., 124 N.L.R.B. 146 (1959) 18, 19

Bailey Company, 75 N.L.R.B. 941 25
Bonwit Teller, Inc., 96 N.L.R.B. 608 17

Cleveland Trust Co., 102 N.L.R.B. 1497 17
Cosco Products Company, 123 N.L.R.B. 766 16

Dal-Tex Optical Company, Inc., 136 N.L.R.B. 1782, 1786-1787 (1962) 22

Fetzer Television, Inc., 129 N.L.R.B. 660 (1960) 19

W. T. Grant Co., 104 N.L.R.B. 338 17

Hudson Hosiery Company, 72 N.L.R.B. 1434 19

Indiana Metal Products Corp., 100 N.L.R.B. 1040 16

Lowell Sun Publishing Co., 136 N.L.R.B. 206 (1962) 16

Nickey Chevrolet Sales, Inc., 142 N.L.R.B. No. 4, 63-1 CCH NLRB ¶ 12,292 (April 10, 1963) 16, 19

Pyne Molding Corp., 110 N.L.R.B. 1700 16

Reliance Fuel Oil Corp., 129 N.L.R.B. 1166 (1961) 16, 19

The Newton Co., 112 N.L.R.B. 465 17
True Temper Corp., 127 N.L.R.B. 839 ..... 18, 19

Willard's Shop Rite Markets, Inc., 132 N.L.R.B. 1146 (1961) 16, 19, 22

No. 26

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963

NATIONAL LABOR RELATIONS BOARD, *Petitioner*

v.

EXCHANGE PARTS COMPANY, *Respondent*

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

Brief For Respondent

Opinion Below

The opinion of the Court of Appeals (R. 115-129) is reported at 304 F. 2d 368. The Board's decision adopting the Examiner's report (R. 20-34) and its order (R. 52-54) are reported at 131 N.L.R.B. 806.

Question Presented

Respondent respectfully submits that the question presented is the following:

> Whether standing alone and unconditionally a change in the time for taking vacations, the restoration of a pre-existing policy concerning overtime in respect to holidays and the announcement thereof in face of a union organizing campaign and forthcoming representation election constitute a violation of employee rights under the National Labor Relations Act, as amended.

Statement

I

Proceedings Before the Board

On November 9, 1959, the union (International Brotherhood of Boilermakers, Iron Shipbuilders, Blacksmiths, Forgers and Helpers, AFL-CIO) wrote respondent that it was engaged in organizational work in respondent's plant, and that it represented a majority of respondent's employees (R. 68-69, 99). This was the first respondent knew about any organizational activity among its employees (R. 68-69, 88). The statement in the Board's brief (at page 2) that the union began its organizational campaign on or about October 26 was not found as a fact by the Examiner or the Board and is completely wanting in evidentiary support.

On November 16, 1959, the union filed a representation petition (Case 16-RC-2637) in connection with which a hearing was held December 29 (R. 57). On February 19, 1960, the Board issued its decision and direction of election pursuant to which an election was held March 18 which the union lost (R. 59). Thereafter the union filed objections setting out conduct allegedly affecting the results of the election in respect to some of which the Board ordered a hearing (R. 16-18).

The union also filed an unfair labor practice charge against respondent (Case No. 16-CA-1357) in which it alleged a discriminatory discharge and "other acts and conduct" (R. 7-9). A complaint issued charging respondent with having violated the Act by

(a) On or about February 13, 1960, placing in effect a change in scheduling vacations so as to permit employees to obtain an additional week-end during their vacation period,

(b) On or about February 25, 1960, announcing an additional holiday, and

(c) On or about March 4, 1960, announcing and placing in effect a change in computing overtime pay during a week in which a paid holiday fell which resulted in financial benefit to the employees (R. 11-13).

The hearing on this complaint was consolidated with the hearing on the union's objections in the representation proceeding (R. 15-16). Only two witnesses testified, C. V. McDonald, respondent's vice-president and general manager and an employee named Townley (R. 22).

The Examiner who heard these matters issued his report on February 2, 1961, (R. 20-34) in which he recommended that the union's objections concerning the election be overruled excepting the one dealing with the granting of economic benefits (R. 28-30). The Examiner noted in respect to the complaint that "In essence the General Counsel contends that the granting and timing of the announcements of these benefits during the union campaign and pending an election, irrespective of motive, constitutes a violation of the Act" (R. 25). The complaint made no reference to the organizing campaign or pending election and contained no allegation that the purpose of the conduct

complained of was to interfere with such campaign or election (R. 11-13, 36-37, 57). The Examiner disposed of respondent's contention and supporting evidence that it was not motivated by any unlawful considerations by holding that "* * * motive is neither controlling nor material" and cited as his sole authority the Board's decision in *American Freightways, Inc.*, 124 N.L.R.B. 146 (R. 27-28).

The Examiner concluded that respondent violated the Act by granting a sixth holiday, changing the time for taking vacations, treating paid holidays as time worked in computing overtime pay and by the announcement thereof (R. 29-34).

The decision of the Board issued May 26, 1961, simply adopted the Examiner's report without change (R. 52-55). The Board made no independent findings or conclusions.

On March 2, 1961, the union filed a motion to withdraw its objections concerning the 1960 election and to withdraw its 1959 representation petition (Case No. 16-RC-2637) (R. 34). The Board granted the motion by order dated March 23, 1961 (R. 51) and the representation proceeding thereupon was closed.

II

The Facts

This part of the statement of the case will be confined to the change in the time for taking vacations and the restoration and reiteration of the overtime policy relative to paid holidays. The matter of the added or sixth holiday is not before the court.[1]

A. Background

On November 4, 1959, without knowledge of any union activity, if, in fact, any existed, respondent issued a letter to each employee stating that its officials had recently returned from an industry conference at which "a great deal of emphasis was placed on *employee welfare*" (R. 68-71, 87, 101-103). It was pointed out that respondent had provided increased employee benefits—"a wonderful insurance program * * * more paid vacations * * *, more paid holidays each year, lunchroom facilities, free medical examinations, free flu shots, coffee breaks and a constantly increasing Xmas bonus". Yet, respondent said it was not satisfied and wanted to do more. To that end and to learn what else respondent could do, it engaged a firm of personnel consultants to make a survey the results of which would be considered "next Saturday" (November 7) and problems corrected. It was also

[1] The Board noted in its brief (at page 3, footnote 1) that the Court of Appeals held the evidence insufficient to support the Board's finding concerning the added holiday and that "the correctness of its ruling in this regard is not in issue here". Also at page 6, footnote 5, it is pointed out that the Court rejected the Examiner's finding that the timing of the birthday holiday announcement was unlawful and that "its ruling on this point was not questioned in the petition for certiorari".

pointed out that for the past six months respondent had been working on a *wage incentive* program which respondent wanted to discuss with the departmental representatives chosen by the employees (R. 101-103).

By another communication of the same date the employees and their wives were invited to a dinner meeting at the plant on November 4 and 5 (R. 69-70, 103-104). It was at these meetings that the addition of the sixth holiday was announced for 1960 (R. 68, 71-72).

There is no evidence that respondent took any further action in respect to its wage incentive program or its meetings with departmental employee representatives after receiving the union's November 9 letter.

B. The change in the time for taking vacations

The regular work week was extended in 1959 to 49½ hours in 5½ days beginning on Monday and ending at noon on Saturday. The week for payroll purposes ended on Thursday and the next day, Friday, was payday. The burden on the accounting department was such that about the first of the year 1960 respondent decided the payroll week should end on Wednesday in order to give more time in which to prepare the checks for the usual Friday payday. This was done and the employees were so notified by bulletin dated January 5, 1960 (R. 62-63, 79-81, 111).

Up to the time of this change the vacation week coincided with the payroll week (R. 62, 81). Employees entitled to a week of vacation left work at the end of their work assignment on Thursday and

returned to work on the second Friday thereafter (R. 62, 81). When the payroll week was changed instead of leaving the vacation week as it had been which then would coincide with neither the work week nor payroll week, respondent changed it so as to coincide with the workweek (R. 82). After the change employees completed their work week on Saturday and returned from a week of vacation on the second Monday following. The amount of the vacation allowance and vacation pay remained exactly the same (R. 81-82). The change was not conditioned in any way upon the employees conduct in respect to self organization or the results of the election.

The complaint alleged that this change was made February 13, 1960, (R. 12) which was prior to the issuance of the Board's direction of election on February 19 (R. 57). An employee left work on February 13, 1960, to go on vacation under the new schedule (R. 82-84, 89, 113-114).

There is no question about the lawfulness or propriety of respondent changing its payroll week. The Examiner, with Board approval, found that the resulting change in the time for taking vacations was an economic benefit to the employees because it enabled them to combine their usual unpaid for weekend with their ensuing vacation work week. As such it was held to be unlawful in face of the union's organizing campaign and the pendency of the representation petition (R. 27-28). The petition was pending for a little more than sixteen months—from November 16, 1959, until March 23, 1961.

C. Restoration and reiteration of overtime policy

In 1959 respondent issued a bulletin to employees announcing that the entire plant and warehouse would be closed Saturday, July 4th, in observance of Independence Day and that "In accordance with Company policy, employees will be paid 4½ hours for this holiday, regular time or overtime, in accordance with hours worked * * *" (R. 61-62, 67, 85, 99).

Previously a holiday had not been treated as time worked in computing weekly overtime. On the basis of an extended work week, i.e., in excess of 40 hours, this resulted in less overtime premium pay in a week in which a holiday fell. Respondent did not intend this result and issued the bulletin to correct it (R. 61, 85).

After Christmas in 1959, and prior to the representation hearing on December 29, it came to respondent's attention that the accounting department had not carried out the policy after the July 4 holiday (R. 61, 63, 85-86). Respondent determined then to give effect to it in the future (R. 86).

The Examiner held that this determination by respondent in December 1959 to give effect to the overtime policy that it made, expressed and followed in connection with the July 4th holiday in 1959 and the listing thereof in an outline of employee benefits sent to employees with a letter dated March 4, 1960, was violative of the employees' rights under the Act (R. 26-28).

Neither the determination to follow such policy, nor the listing of it as a benefit was in any way condi-

tioned or dependent upon the employees' conduct in the exercise of their rights under the Act or upon the outcome of the election.

D. The pre-election campaign

The union addressed several communications to respondent's employees in an effort to sell them on taking membership and designating the union to represent them for purposes of collective bargaining. As a part of its sales campaign the union held out the promise of increased wages, additional benefits, job security and so forth. The union charged respondent with being dishonest, with having a new found interest in the employees because of its fear of the union, with threatening employees and with trying to buy their vote "ever since the Union started organizing" (R. 78-79, 106-110).

In advance of an employee meeting on February 25, 1960, (which was scheduled prior to the issuance of the Board's direction of election R. 76-77) the union addressed letters to the employees in which it predicted that in an effort to buy their vote respondent would offer them "possibly two more paid holidays" and "twenty-five cents per hour increase in wages". It was predicted in connection with the wage increase that "he (respondent's vice-president and general manager) will no doubt tell you that you will receive this increase after you have voted the Union out of the picture, (the bribe tactics)". Added to this prediction was the statement, "You are going to get your wage increase, and it is going to go through a Bargaining Committee selected by you, the employees, and

REMEMBER ONE THING, anything he can promise now in his confused desperation to win votes can no doubt be doubled at the bargaining table" (R. 108-109).

At the February 25 meeting respondent's vice-president told the employees that the union organizer had misrepresented the facts about the things respondent had done for its employees in the past. He reviewed the improvements and changes that were made when there was no threat of a union (R. 60).

On March 4, 1960, respondent sent employees a statement entitled "Facts You Should Know About Your Benefits at EPCO", which began:

> " 'Brother' Tison (the union's organizer) would have you believe that all the things that EPCO does for you are done for one purpose—to buy your vote at the Labor Board election March 18th. He would have you believe that before his boilermakers, iron shipbuilders, blacksmiths and forgers union started trying to organize this automotive parts rebuilding plant you folks did not have any benefits! He would have you believe that before he arrived your Company cared nothing for you."

It was then pointed out that the story of benefits furnished by respondent started in 1938 when the Company was founded and that more benefits had been added year by year, long prior to the inception of the union's organizing campaign.

Added and increased benefits were listed for a number of years. Those listed for 1960 included a sixth

paid holiday, "No loss of overtime pay during the week a paid holiday is given. This will mean $5.00 to $6.00 more per employee per holiday", and "Vacation time extended 1½ days" (R. 64, 90-96).

The sixth paid holiday was announced at the meetings on November 4 and 5, 1959, and is not here involved. (Supra page 5)

III

The Decision of the Court of Appeals

The Court of Appeals denied enforcement of the Board's order (R. 115-130).

The court held that the findings and conclusions of the Examiner and the Board in respect to the granting and announcing of the sixth holiday were not supported by the record (R. 118-119). The Board does not here contest that disposition of the matter. (Supra page 5)

As to the holiday overtime pay and vacation period the court accepted the finding that respondent granted those benefits "with an intent to influence the outcome of the representation election" and noted that this "poses squarely the legal question whether such action necessarily constitutes an unfair labor practice as defined and prohibited by 29 U.S.C.A. Sec. 158(a)(1)" (R. 120). After an extended review of authorities the court concluded that such action in the circumstances of the case was not violative of the Act. "Summarizing", the court said, "the critical fact in this case is that the benefits carried no coercive ele-

ment; they were not conditioned upon the employee's relinquishment of any rights. The employees had, as the Act intended the employees to have, an unfettered right of self-organization, a free choice" (R. 128).

Summary of Argument

The change in respect to vacation schedules and overtime and the announcement thereof were not unlawful in the circumstances here present. This case differs tellingly from the cases on which the Board relies.

The Act did not require that the employees be deprived of those benefits because of the union's efforts to obtain from them the right to represent them in collective bargaining.

There was no obligation to bargain. The changes were not made in consideration of or conditioned in any way upon the relinquishment of any rights by the employees or upon the outcome of the representation election and there was no such relinquishment. The changes were not accompanied by any unfair labor practices or any "injury" to the employees or to their rights. The employees remained free as before to exercise their rights as they saw fit.

The lawfulness of the changes and the announcement concerning them does not turn on the state of the employer's mind in respect to them. The employer's expressed opposition to the union was not unlawful and did not render the changes or the announcement unlawful.

The effect of the changes and announcement upon

the union and its efforts to solicit from the employees the right to represent them is not a proper consideration in deciding in this case whether or not Section 8(a) (1) was violated.

The judgment and opinion of the Court of Appeals are correct and should be affirmed.

Argument

Respondent rests the argument of its case upon the sound judgment and able opinion of the Court of Appeals and respectfully submits that its judgment should be affirmed.

The Court easily and correctly could have found that the Examiner's inference of unlawful motivation went only to the added holiday and, if considered at all, in connection with the vacation or overtime benefits was lacking in substantial support on the record as a whole.

However, the Court sustained the finding that the vacation and overtime benefits were granted with the intent to influence the employees, and it thereby reached the legal question posed so clearly in this case —whether when unattended by unfair labor practices and in face of a union's organizing campaign and a representation election the right of employees to receive and the right of the employer to grant reasonable and proper benefits permanently and unconditionally turns on the purely subjective test of the employer's state of mind, and whether such grant is unlawful if it can be inferred reasonably that the employer in-

tended thereby to influence the employees in the exercise of their rights under the Act.

Here there was no objective manifestation of such intent other than the timing of the general announcement of the vacation and overtime benefits, the assertion that respondent had granted benefits and improvements consistently through the years when there was no union, and the urging of employees to vote against the union. Unquestionably these expressions constituted a lawful exercise of protected speech and may not be used to impute improper motivation without effectively removing the protection and destroying the freedom vouchsafed by the Act.

If in the circumstances of this case the Act made it unlawful for the employees to receive and respondent to grant the benefits here accorded them, it follows as a realistic and practical matter, that whenever and so long as a union seeks to organize employees they and their employer must mark time in respect to improvements in terms and conditions of employment. Respondent submits that the Court of Appeals was correct in holding that the Act does not permit or require any such anomaly.

It is well established that an employer violates Section 8(a) (1) if he grants economic benefits to his employees in exchange for their agreement to abandon or reject the union. The Court of Appeal was aware of this principle and in agreement with it, but the case at bar is not that kind of case. Here the benefits were granted permanently, unconditionally and unattended

by unfair labor practices leaving the employees as free and unfettered as they were before.

The Board cites and quotes from *Medo Photo Supply v. National Labor Relations Board*, 321 U.S. 678, 88 L ed. 1007 (1944) (Brief pp. 8-9). The employer in that case was under a positive legal duty to bargain exclusively with the union. In complete disregard of that obligation and the union the employer treated directly with employees and granted them a wage increase in return for their promise to repudiate the union they had designated as their representative. Upon those facts the employer was held to have violated Section 8(a) (1) and (5) of the Act.

That case and the one at bar are in no sense analogous. Here there was no obligation to recognize or to bargain with the union for it was engaged only in an effort to obtain memberships and bargaining rights from the employees. Here the benefits accorded were not in consideration of or in any way connected with or contingent upon the employee's conduct in the exercise of their rights under the Act. Respondent did not discuss or negotiate with any employees concerning them. They were given at arms length without any character of deal express or implied. Moreover there was not attendant unlawful conduct on the part of respondent.

The Board has undertaken to generalize the "rule" in *Medo* and to transpose it to the instant case by citing a wide variety of clearly distinguishable cases.[2]

[2]Brief at pages 8 and 9, footnote 6.

The cases in which the employer granted benefits in violation of his duty to bargain collectively, as in *Medo*, are patently inapposite and provide no rule of decision under the facts in the instant case.[3]

The same is true of cases such as *Medo* in which the offer or grant of a wage increase or other benefit was in consideration of or conditioned on the employees withdrawing from the union or voting against it or taking or withholding other action in the exercise of their rights under the Act.[4]

Likewise inapposite are the cases in which the employers were guilty of unfair labor practices that accompanied the benefits or provided the context in which they were granted such as unlawful interrogation, surveillance, threats, promises, discriminatory treatment and discharges,—cases in which the benefits were "one part of an over-all program of interference and restrain by the employer."[5]

---

[3] *N.L.R.B. v. Katz*, ... U.S. ....., 8 L.ed. 2d 230 (1962); *Medo*, Supra; *May Department Stores Co. v. N.L.R.B.*, 326 U.S. 376, 90 L.ed. 145, 66 S. Ct. 203; *N.L.R.B. v. Crompton-Highland Mills, Inc.*, 337 U.S. 217, 93 L.ed. 1320, 69 S. Ct. 960; *Nickey Chevrolet Sales, Inc.*, 142 N.L.R.B. No. 4, 63-1 CCH NLRB ¶ 12,292 (April 10, 1963).

[4] *Joy Silk Mills v. N.L.R.B.*, 185 F. 2d 732, (C.A.D.C.; 1950) cert. den., 341 U.S. 915; *N.L.R.B. v. Bailey Co.*, 180 F. 2d 278 (C.A. 6; 1950); *M. H. Ritzwoller Co. v. N.L.R.B.*, 114 F. 2d 432 (C.A. 7; 1940); *N.L.R.B. v. Gate City Cotton Mills*, 167 F. 2d 647 (C.A. 5; 1948) *Lowell Sun Publishing Co.*, 136 N.L.R.B. 206 (1962); *N.L.R.B. v. Lowell Sun Publishing Co.*, 320 F. 2d 835 (C.A. 1; 1963).

[5] *N.L.R.B. v. Crown Can Co.*, 138 F. 2d 263 (C.A. 8; 1943); *N.L.R.B. v. West Coast Casket Co.*, 205 F. 2d 902 (C.A. 9; 1953); *N.L.R.B. v. Pyne Molding Corp.*, 226 F. 2d 818 (C.A. 2; 1955); *Indiana Metal Products Corp. v. N.L.R.B.*, 202 F. 2d 613 (C.A. 7; 1953); *Cosco Products Company*, 123 N.L.R.B. 766; *Willard's Shop Rite Markets, Inc.*, 132 N.L.R.B. 1146; *Pyne Molding Corp.*, 110 N.L.R.B. 1700; *Indiana Metal Products Corp.*, 100 N.L.R.B. 1040.

Respondent is not in disagreement with the Board's assertion (Brief at pages 12-13) that there are certain kinds of changes in working conditions that inherently contravene the Act. Cited and quoted in this connection is *National Labor Relations Board v. Erie Resistor Corp.*, 373 U.S. 221, 10 L.ed 2d 308 (1963). That case concerned the employer's grant of 20 years added seniority to employees who did not strike and to those who were hired to replace strikers. The employer's contention that this was done in order to continue to operate its business in face of the strike was held not override the inherent discrimination that contravened the Act. The Board concedes that "The benefits in the present case were not of that nature" (page 13 footnote 8). The same is true of the conduct involved. The decision has no proper application. The attempt to separate and transplant certain of the Court's statements from that case fails because they cannot take root in the facts of this case.

The Act does not prohibit the granting of benefits to employees in face of a union's organizing campaign and a representation election. The courts have recognized that grants in these circumstances on account of business or other legitimate considerations are not unlawful.[6]

[6] *N.L.R.B. v. W. T. Grant Co.*, 208 F. 2d 710 (C.A. 4; 1953) denying enforcement of the Board's order (104 N.L.R.B. 338); *N.L.R.B. v. Cleveland Trust Co.*, 214 F. 2d 95 (C.A. 6; 1954) denying enforcement of the Board's order (102 N.L.R.B. 1497); *Bonwit Teller, Inc. v. N.L.R.B.*, 197 F. 2d 640 (C.A. 2; 1952) cert. den. 345 U.S. 905 denying enforcement of the Board's order (96 N.L.R.B. 608); *N.L.R.B. v. The Newton Co.*, 236 F. 2d 438 (C.A. 5; 1956) denying enforcement in pertinent part of the Board's order (112 N.L.R.B. 465, 504-505).

In these cases the benefits granted were held not to so affect the employees as to interefere with, restrain or coerce them in the enjoyment and exercise of their rights under the Act notwithstanding they were in the form of wage increases and other substantial betterments and notwithstanding the employer had given lawful expression to his opposition to the union. The employees remained free and unfettered in the exercise of their rights under the Act in respect to self-organization, the evaluation of the union's organizational appeal, and the untrammelled expression of their wishes in a representation election.

The Board apparently pays no more than qualified and occasional lip service to the holdings in these cases. In the instant case it adopted without qualification and thereby approved the Examiner's invocation of the rule laid down in *American Freightways, Inc.*, 124 N.L.R.B. 146 (1959), that the employer's motive is neither controlling nor material. (R. 28).[7]

---

[7]The Board has made an artful and determined attempt in its brief to free itself of its holding in *American Freightways*. Significantly it has refrained from doing so as a matter of decision although it has been confronted with the question many times since.

It here argues that language in *American Freightways* "suggests that motive may be irrelevant". The language from that case quoted by the Examiner and adopted by the Board in the present case is, "It is well settled that the test of interference, restraint, and coercion under Section 8(a)(1) of the Act does not turn on the employer's motive or on whether the coercion succeeded or failed". Noting the Board's holding in *American* rejecting the respondent's contention that it was not guilty of unlawful motivation the Examiner here held that "motive is neither controlling nor material" (R. 28).

The Board also argues that this "suggestion" in *American Freightways* was negated in "later decisions". The only "later" decision cited is in *True Temper Corp.*, 127 N.L.R.B. 839, decided by adoption of

In its brief (at pages 13-14) the Board argues that "under a strictly literal interpretation of Section 8(a)(1)" grants made for business considerations may "be said to 'interfere' with the employees' right of self-organization, at least to the extent that they obviate some of the conditions which originally impelled the employees to seek collective bargaining", that "if it is apparent to the employees that there is a legitimate business purpose for the employer's action, they are not likely to consider the benefits conferred as something which could only be gained and retained if there were no union" and finally, "even if a grant of benefits in these circumstances could be thought to restrain or coerce the employees, a privilege is accorded the employer to inflict this 'injury' in the interest of ac-

---

the Examiner's report on May 19, 1960, a few days more than one year *before* the decision in the present case.

The Board now states that the correct rule was set forth in its decision in *Hudson Hosiery Company*, 72 N.L.R.B. 1434, decided March 28, 1947. The Examiner in *American Freightways* relied on *Hudson* and the absence of unlawful motivation in finding that the respondent had not violated the Act (124 N.L.R.B. 146, 157) and he was reversed by the Board as above noted. In *Fetzer Television, Inc.*, 129 N.L.R.B. 660 (1960) the Examiner was the one who heard the *American* case. The Board adopted his report in Fetzer in which he referred to the Board's test in *American* and observed there was nothing in *True Temper* that altered or modified that test. (at page 668). In *Reliance Fuel Oil Corp.*, 129 N.L.R.B. 1166, 1175 (1961) the same Examiner applied the *American* doctrine again noting that *True Temper* had not changed it. The Board found it unnecessary to apply the *American* doctrine because of contemporaneous unfair labor practices but it did not repudiate it. In *Willard's Shop Rite Markets, Inc.* 132 N.L.R.B. 1146 (1961) the Examiner observed that *Hudson* and *American* appeared to be in conflict with each other, but the Board passed over the matter without comment much less a decision on the point. As late as April 10, 1963 the Board invoked the *American* doctrine in *Nickey Chevrolet Sales, Inc.*, 142 N.L.R.B. No. 4, 63-1 CCH N.L.R.B. ¶12,292. No case has been found in which the doctrine has been withdrawn or overruled by the Board.

commodating his legitimate interest in running his business. See *Republic Aviation Corp. v. National Labor Relations Board*, 324 U.S. 793, 798. But this immunity exists only if the employer acts for the purpose for which the privilege was given. Hence, where, as here, his motive is antiunion, the privilege will not protect him."

This explication of the Board's concept of the law demonstrates its patent unsoundness. First it assumes contrary to fact that the employees were engaged in their own effort to organize in order to obtain certain benefits instead of being importuned with promises by union organizers to join the union and give it the right to represent them in bargaining as was the case here. Next it proceeds and rests upon the false premise that opposition to a union is not "legitimate". It recognizes that the employer's motivation must be made apparent to the employees in order for the employer to qualify for the protection of the "privilege" referred to. This rules out the purely subjective test and concedes the objective test in agreement with the Court of Appeals. It also gives rise to questions concerning the source of the "privilege" and "immunity" upon which employers are said to be dependent and by whom and upon what terms and conditions the same are granted, withheld or withdrawn. Surely the Board lays no claim to such power or authority.

And finally the heart of the matter is reached in the answer to the remaining question, namely, upon whom is the "injury" inflicted when as here benefits are granted the employees permanently, unconditionally

and unattended by any unfair labor practices? Obviously it is not the employees who were injured because they gained desirable ends without surrendering or losing anything. The gains or benefits themselves were neither injurious nor unlawful. The Examiner and the Board were careful to provide that nothing in the order "shall be construed as requiring the respondent to vary or abandon any economic benefit or any term or condition of employment which it has heretofore established" (R. 32, 53-54). Had the vacation and overtime benefits involved been injurious to the employees the Board would have ordered the restoration of the status quo ante.

To grant improvements which may "obviate some of the conditions" which might impel employees to organize or designate a union to represent them certainly is neither injurious to the employees nor unlawful on that account. The law does not require employees to be organized and represented by a union before they can be given improvements in their benefits and working conditions.

Manifestly the "injury", if any, in this case was not to the employees, but to the union that was "seeking to organize the employees" (R. 32). Herein, respondent submits, lies the fundamental error of the Board. It has treated the union and the employees as being one and the same and synonomous in its interpretation and application of the Act. It has for all practical purposes sought to amend Section 8(a) (1) administratively so as to provide that it shall be an unfair labor practice and unlawful for an employer to inter-

fere with a union in its efforts to organize his employees. By its decisions it has undertaken to impose a rule as here that would require the employer to do nothing that would affect his employees beneficially because of its detraction from the union's organizing campaign by making the employees less receptive to being "sold" by the union. The union thereby becomes the end rather than a means to the end, and the employees whose rights Congress undertook to protect by the Act become subordinated and ignored. They are deprived of improvements in their working conditions and forced to mark time from the inception of the union's organizing efforts until the campaign is ended one way or another—in this case over 16 months later! The Board has gone even further in at least one case, *Willard's Shop Rite Markets*, 132 N.L.R.B. 1146, by holding that benefits granted in anticipation of an organizing effort not yet begun among the employer's employees were unlawful.

This interpretation of Section 8(a) (1) which makes the union the chief beneficiary under the Act accords with the Board's refusal to give effect to the free speech provisions of Section 8(c) in representation cases with the result that elections lost by unions are set aside because of lawful, protected free speech of the employers.[8]

---

[8]See *Dal-Tex Optical Company, Inc.*, 136 N.L.R.B. 1782, 1786-1787 (1962) in which it is stated that the duty of the Board is to "advance the statutory policy of *encouraging* the practice and procedure of collective bargaining" (emphasis added). The Board appears to provide this encouragement by favoring unions in its interpretation and administration of the Act in a manner that is not to be found in the Act and that was never intended by Congress.

The Board thereby restricts and abridges the exercise of effective, lawful, free speech of the employer and deprives the employees of the use and benefit of it in the interest of shielding and protecting the union from the effects thereof. Elections lost by the union are set aside by the Board assertedly because the lawful, protected free speech of the employer "interfered with" the employees in the exercise of their rights under the Act so that they were incapable of a free choice.

This is precisely what the Board said befell the employees in the present case because of the vacation and overtime benefits. The Board's concept of what constitutes interference under the Act is thus brought full circle.

The Board makes no effort to conceal its concern over the effect upon the union of the granting of employee benefits. It argues in effect that the union was unlawfully disadvantaged by the grant because of its inability to respond in kind. It further argues, substantially, that the grant is unlawful because the employees may be made less receptive to the union. Neither of these results is unlawful, and both arguments overlook the fact that the required withholding of benefits would not balance the scales. On the contrary it would disadvantage the employees, and give the union an unfair advantage in blocking improvements which it could then promise to obtain for the employees thereby inclining them to vote for the union. This may be and probably is the end that the Board believes should be accomplished, but the Act neither requires nor supports it.

The Board has erroneously concluded that the Court of Appeals held Section 8(c) encompasses the granting of economic benefits. The court interpreted and applied Section 8(a) (1). It pointed to Section 8(c) as evidencing the fact that expressed opposition to the union and the non-coercive efforts of the employer to persuade his employees that a union was not necessary or desirable, was not unlawful and did not constitute interference, restraint or coercion in violation of Section 8(a) (1). Just as promises of reward and threats of reprisal referred to in Section 8(c) are only two of many forms of prohibited interference, restraint and coercion, so also all conduct not protected expressly by Section 8(c) is not such as constitutes intereference, restraint or coercion. For example, benefits granted for business or other legitimate purposes are not embraced in Section 8(c) as such, but they are nonetheless lawful. Persuasion of employees not to join a union is not an illegitimate or unlawful purpose.

The court thus found that the granting of benefits permanently, unconditionally and unattended by unfair labor practices for the purpose of persuasion that a union was not necessary did not constitute unlawful intereference with restraint or coercion of employees under Section 8(a)(1) as read in the light of and consonant with the entire Act.

A host of cases that spell out interference, restraint and coercion in contravention of Section 8(a) (1) involve threats, promises, interrogation, surveillance, discrimination and other forms of pressure on em-

ployees that by allurement, punishment, fear and otherwise impairs or destroys the free exercise of their right to engage or refrain fom engaging in the activities protected by the Act.[9]

The present case "differs tellingly from the actions prohibited by this wide range of cases" (R. 127). It also differs from cases in which benefits were held out as promises for the future instead of being given outright, permanently and unconditionally regardless of the employees actions in respect to self-organization or collective bargaining.[10] Such promises are not protected by Section 8(c). They may constitute "allurements" that exert economic pressure rather than persuasion on the employees by placing them in the position of having to chose between the promised benefit and the exercise of their rights under the Act.

Cases of that character fall under the principle applied in cases in which benefits were granted in consideration of the repudiation of the union as in *Medo*, or coupled with threats as in *Crown Can*, or in return for an agreement to vote against the union.

In both type of cases,—the promise and the conditional grant, the interference results from "the squeeze in which the employees are placed".

The "allurements" in *Western Cartridge Co. v.*

[9] *Rapid Roller Co. v. N.L.R.B.*, 126 F 2d 452 (C.A. 7; 1942); *Collins Baking Co. v. N.L.R.B.*, 193 F. 2d 483 (C.A. 5; 1951); *N.L.R.B. v. Economy Furniture*, 284 F 2d 339 (C.A. 5; 1960); *N.L.R.B. v. Ferguson*, 257 F 2d 88 (C.A. 5; 1958) *N.L.R.B. v. Gate City Cotton Mills*, 167 F 2d 647 (C.A. 5; 1948)

[10] Compare, *N.L.R.B. v. Bailey Co.*, 180 F 2d 278 (C.A. 6; 1950); *Bailey Company*, 75 N.L.R.B. 941.

N.L.R.B., 134 F 2d 240 (C.A. 7, 1943) put "the squeeze" on the employees there, but that case and the one at bar are poles apart. In *Western* the company and a favored independent union were faced with organization by an outside union. The company urged employees to execute individual contracts which, at the instance of the independent union in order to bolster its declining membership, carried a 2% "wage bonus". In these and other coercive circumstances the court gave utterance to its oft quoted words that "interference is no less interference because it is accomplished through allurements rather than coercion". The court's statement continues, "where, as here, the system is employed to stem a tide of organization and is adopted as a means of eliminating outside unions as collective bargaining agents of the company's employees" (at page 244).

In the present case the employees were in no squeeze and under no economic pressure as the result of the benefits accorded them. The Board's argument concerning respondent's exercise of its economic power is wide of the mark insofar as the employees and their rights under the Act are concerned.

The record here shows that respondent granted benefits to its employees for each of several years prior to the union's determination to undertake an organizing effort. They were made unconditionally in 1959 and before as they were in 1960. In many instances they were more substantial than those here involved. They all flowed from identically the same economic power. It would not be unreasonable to infer that in

some degree the employees were caused thereby to feel they had no need of union representation and that, in part, such was the hope and purpose of respondent. Notwithstanding that effect and purpose the improvements were not unlawful.

The benefits here involved arose out of perfectly legitimate and unsuspicious circumstances that were reasonably related to the usual conduct of employee relations. They were not themselves unreasonable or suspect. The only new element was the union's determination to try to organize the employees and its campaign to that end. The Court of Appeals was correct in holding that under the Act this did not give rise to the requirement that the employees be deprived of the benefits that were accorded them in the circumstances here present. Informing the employees of such benefits along with all of the other benefits likewise was not unlawful.

An improvement in working conditions during an election period is not an unfair labor practice where, as here, there is no suggestion that such benefits would be withdrawn if the union were successful. *Peter J. Schweitzer, Inc. v. N.L.R.B.*, 144 F 2d 520 (C.A. D.C.; 1944). If that were not true it "would mean that it is the duty of an employer to refrain from benefiting his employees in order to make them more inclined to vote for a union." (144 F 2d 520, 524)

The minimizing of the influence of organized bargaining stemming from the employer's unilateral action in *May Department Stores Co. v. N.L.R.B.*, 326 U.S. 376, 90 L ed 145 (1945) is a far cry from the pre-

sent case. There the employees were represented for purposes of collective bargaining and the employer went ahead with wage adjustments without negotiating with the bargaining agent. It was this conduct that the court said "minimizes the influence of organized bargaining" and interferes with the right of self-organization "by emphasizing to the employees that there is no necessity for a collective bargaining agent" (90 L ed 145, 154).

Summarizing, the benefits in the present case "carried no coercive element; they were not conditional upon the employees' relinquishment of any rights." (R. 128) There was no suggestion that they would be withdrawn if the union were successful or that respondent would deal more favorably with the employees if they defeated the union. There were no attendant unfair labor practices. "The employees had, as the Act intended the employees to have, an unfettered right of self-organization, a free choice" (R. 128).

Conclusion

For the foregoing reasons, the judgment of the Court of Appeals should be affirmed.

Respectfully Submitted,

JEAN ALLARD
Chicago, Illinois

HAROLD E. MUELLER

KARL H. MUELLER
Fort Worth, Texas
Attorneys for Respondent

JEAN ALLARD
Maremont Corporation
168 North Michigan Ave.
Chicago 1, Illinois

MUELLER & MUELLER
Burk Burnett Building
Fort Worth, Texas
Of Counsel